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August 13, 1991

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91-261

Title: Massachusetts Water Resources Authority, et al., Petitioners
v.
Associated Builders and Contractors of Massachusetts/Rhode Island, Inc., et al.

Court: United States Court of Appeals for the First Circuit

Counsel for petitioner: Uehlein Jr.,Edward Carl

Counsel for respondent: Baskin,Maurice

Entry	Date	Note	Proceedings and Orders
1	Aug 13 1991	G	Petition for writ of certiorari filed.
2	Sep 11 1991		Brief amici curiae of National Constructors Association, et al. filed. VIDED.
3	Sep 12 1991		Brief of respondent Associated Builders & Contractors of Massachusetts, et al. in opposition filed. VIDED.
4	Sep 18 1991		DISTRIBUTED. October 11, 1991
5	Sep 24 1991	X	Reply brief of petitioners Massachusetts Water Resources Authority, et al. filed. VIDED.
6	Oct 15 1991	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
7	Apr 15 1992		Brief amicus curiae of United States filed.
8	Apr 22 1992		REDISTRIBUTED. May 15, 1992
9	May 18 1992		Petition GRANTED.
			**********
10	Jun 5 1992		Record filed.
		*	Certified copy of proceedings U.S.C.A. - First and U. S.D. C. - Massachusetts (1 Box)
11	Jun 11 1992		Record filed.
		*	Original proceedings U. S. District Court, District of Massachusetts (1 BOX)
13	Jun 23 1992		Order extending time to file brief of petitioner on the merits until July 20, 1992.
14	Jul 15 1992		Order further extending time to file brief of petitioner on the merits until July 22, 1992.
15	Jul 22 1992		Brief of petitioners Massachusetts Water Resources Authority and Kaiser Engineers filed. VIDED.
16	Jul 22 1992		Brief amici curiae of Massachusetts, et al. filed. VIDED.
17	Jul 22 1992		Brief amici curiae of National Constructors Association, et al. filed. VIDED.
18	Jul 22 1992		Brief amicus curiae of United States filed. VIDED.
19	Jul 22 1992		Brief amicus curiae of Mayor Raymond Flynn, City of Boston filed. VIDED.
27	Jul 22 1992		Joint appendix filed. VIDED.
20	Aug 6 1992	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
22	Aug 17 1992		Order extending time to file brief of respondent on the merits until September 8, 1992.
26	Sep 4 1992		Brief amicus curiae of National Right to Work legal Defense Foundation filed. VIDED.

No. 91-274-CFX

Entry	Date	Note	Proceedings and Orders
23	Sep 8 1992		Brief of respondent Associated Builders and Contractors of MA/RI, Inc. filed. VIDED.
24	Sep 8 1992		Brief amicus curiae of Associated General Contractors of America filed. VIDED.
25	Sep 8 1992		Brief amicus curiae of Chamber of Commerce of the United States filed. VIDED.
28	Sep 8 1992		Brief amicus curiae of Utility Contractors Assn. of New England filed. VIDED.
29	Sep 8 1992		Brief amici curiae of Merit Shop Foundation, et al. filed. VIDED.
30	Sep 8 1992		Brief amicus curiae of Master Printers of America filed. VIDED.
31	Oct 5 1992		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
32	Oct 9 1992		Reply brief of petitioners filed. VIDED.
33	Oct 13 1992		SET FOR ARGUMENT WEDNESDAY, DECEMBER 9, 1992. (2ND CASE)
34	Oct 15 1992		CIRCULATED.
35	Nov 12 1992	X	Supplemental brief of respondents filed. VIDED.
36	Nov 24 1992	X	Supplemental brief of petitioners filed. VIDED.
37	Nov 27 1992	G	Motion of the Solicitor General for leave to file supplemental brief as amicus curiae filed.
38	Dec 7 1992		Motion of the Solicitor General for leave to file supplemental brief as amicus curiae GRANTED.
39	Dec 9 1992		ARGUED.

91-258

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

MASSACHUSETTS WATER RESOURCES AUTHORITY
and KAISER ENGINEERS, INC., PETITIONERS

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF
MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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QUESTION PRESENTED

Whether the Constitution and the National Labor Relations Act (the "NLRA") foreclose a state authority, acting as the owner of a construction project, from enforcing a lawful prehire collective bargaining agreement negotiated by private parties as expressly authorized by the NLRA.

LIST OF INTERESTED PARTIES

Petitioner Massachusetts Water Resources Authority is a public entity created by an Act of the Commonwealth of Massachusetts in 1984. It has no non-wholly-owned subsidiaries.

Petitioner Kaiser Engineers, Inc., is a wholly-owned subsidiary of American Capital and Research Corporation, a publicly-traded Delaware corporation headquartered in Fairfax, Virginia. Kaiser has no non-wholly-owned subsidiaries.

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In the Supreme Court of the United States

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MASSACHUSETTS WATER RESOURCES AUTHORITY
and KAISER ENGINEERS, INC., PETITIONERS

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF
MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR A WRIT OF CERTIORARI

The Massachusetts Water Resources Authority and Kaiser Engineers, Inc., by their undersigned counsel, respectfully petition for a writ of certiorari to review the judgment of the court of appeals in this case.

OPINIONS BELOW

The majority and dissenting opinions of the *en banc* court of appeals (App. 1a-48a) will be reported at 935 F.2d 345. The panel opinion of the court of appeals (App. 49a-71a) is reported at 135 L.R.R.M. (BNA) 2713. The opinion of the district court (App. 72a-83a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, Article VI, Clause 2 of the Constitution, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land . . . .

Sections 8(e) and 8(f) of the National Labor Relations Act, 29 U.S.C. §§ 158(e) and (f), are reproduced at App. 143a-144a.

STATEMENT OF THE CASE

A. Introduction

Petitioner Massachusetts Water Resources Authority (the "Authority") is a state entity that provides water and sewer services to almost half the residents of Massachusetts. Under a federal court order entered to redress violations of the Clean Water Act, the Authority is building a $6.1 billion sewage treatment plant to clean up Boston Harbor. The Authority's private construction manager, petitioner Kaiser Engineers, Inc. ("Kaiser"), has entered into a lawful project labor agreement with the building and construction trade unions. The agreement is intended to establish terms and conditions of employment and to ensure harmonious labor relations throughout the ten-year life of the project.

In accordance with Massachusetts' competitive bidding laws, the Authority requests bids for work on the project. To implement the project labor agreement, the Authority required bidders to agree to adhere to the agreement for any work they were awarded on the project. The question presented is whether the NLRA preempts the Authority from continuing to impose such a requirement.

B. Factual Background

1. *The District Court Order to Build the Project*

In September 1985, the United States District Court for the District of Massachusetts ruled that the Authority, as successor to the Metropolitan District Commission, was liable under the Clean Water Act, 33 U.S.C. §§ 1251

et seq., for its predecessor's unlawful discharges of sewage into Boston Harbor. *United States v. Metropolitan District Commission*, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20621 (D. Mass. 1988). Thereafter, the district court entered detailed remedial orders requiring the construction of a new $6.1 billion sewage treatment system for the metropolitan Boston area and other portions of eastern Massachusetts. App. 3a, 74a; *see also United States v. Metropolitan District Commission*, 757 F. Supp. 121 (D. Mass.), *aff'd*, 930 F.2d 132 (1st Cir. 1991).

The district court imposed a strict schedule for the project, calling for new construction to begin by 1988 and to be completed by 1999. The court also ordered additional construction work to maintain and rehabilitate existing treatment facilities (located on Deer Island in Boston Harbor) pending completion of the new project. The court's numerous detailed orders require that construction proceed without interruption, making no allowance for delays from such causes as labor disputes.

2. *The Magnitude of the Authority's Task*

The sewage treatment plant now under construction in Boston is the largest public works project in the history of New England and one of the largest wastewater treatment projects in the history of the nation. At the height of construction, as many as 22 prime contractors and 100 subcontractors will be working simultaneously. They will employ as many as 2500 workers engaged in numerous construction trades.

All of this construction work will take place on a small, crowded site with limited means of access. Deer Island, the site of the new plant, has an area of only 215 acres and is located across a causeway at the end of a long, narrow peninsula extending into Boston Harbor. Because only a single narrow road winding through residential neighborhoods connects Deer Island to the mainland, use of the site was conditioned (by agreement with the host communities) upon transporting half the workers and all construction materials to Deer Island by water.

The economic reality confronting the Authority in the Boston area is that most of the workers at Deer Island will be union workers. Unionized contractors perform more than 75 percent of commercial construction work in the Boston area, and more than 30 unions represent employees in the building and construction trades. These unions typically have entered into separate collective bargaining agreements with employers, and the usual term of those agreements is substantially less than the projected ten-year life of the project. Accordingly, numerous collective bargaining agreements will expire during the project, and each expiration is a potential occasion for a strike or other permissible concerted action.

A strike by one union could disrupt the entire project. Other unions may choose to respect the picket lines of the striking union. Even if the other unions initially choose not to discontinue work in support of a strike, they may soon find themselves unable to proceed further with the project because of work that has not been completed by the strikers. In addition, given the size of the project and the variety of tasks to be performed, there is significant potential for jurisdictional conflict between unions regarding which workers should be assigned particular work. Because local collective bargaining agreements provide no mechanism for resolving such disputes, time-consuming proceedings before the National Labor Relations Board (the "Board") might be required before the work could go forward.

The geographical characteristics of the project site increase the potential for work disruption resulting from labor disputes. With only a single road and a single set of piers providing access to Deer Island, virtually any picketing is likely to cause delay. Indeed, in November 1988, when two union locals picketed to protest the use of a non-union subcontractor, all construction activity on Deer Island came to a virtual standstill. App. 4a n.2, 96a-97a; J.A. 277.[1]

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[1] "J.A." refers to the parties' joint appendix in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

3. *The Project Labor Agreement Negotiated by Kaiser*

In April 1988, the Authority retained Kaiser to serve as construction manager for the project. J.A. 327. Kaiser is a private-sector company that is "an employer engaged primarily in the building and construction industry," within the meaning of Section 8(f) of the NLRA, 29 U.S.C. § 158(f). One of Kaiser's principal responsibilities was to assist the Authority in developing and implementing a labor relations policy to avoid disputes that might disrupt or delay the project.

Soon after it was retained, Kaiser recommended to the Authority that Kaiser negotiate a project labor agreement with the Building and Construction Trades Council of the Metropolitan District, its affiliated local unions, and other union entities. Kaiser based its recommendation on, among other things, the district court's demanding construction schedule, the geographical constraints on the project, the need to transport workers and materials to the project site by ferry, the duration of the project, the cost of delay, and the need to provide uniform rules regarding work hours, travel pay, and other matters. For all these reasons, Kaiser concluded that the Boston Harbor project was unacceptably vulnerable to labor disruption, including legal picketing, that was likely to occur in the absence of a prehire collective bargaining agreement. J.A. 328-30.

The Authority accepted Kaiser's recommendation and authorized Kaiser to negotiate a project labor agreement. The Authority did not participate in the collective bargaining process, but it did retain the right to approve any agreement negotiated by Kaiser. In May 1989, Kaiser completed its successful negotiation of the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement (the "Agreement"). App. 107a-140a. By its terms, the Agreement was to apply to all construction work on the project.

The Agreement provided several important benefits for the Authority. First, and most important, it prohibited

all "strikes, picketing, work stoppages, slowdowns or other disruptive activity" for the duration of the project. Second, it established an expedited dispute resolution procedure (with judicial enforcement) for any disputes that might arise during the project, including a commitment to arbitrate any jurisdictional disputes between unions, with former Secretary of Labor John Dunlop acting as the arbitrator. Third, it created uniform work rules for the project with respect to such matters as hours of work, pay for travel to and from the work site, meal periods, and parking.

In exchange for these benefits, Kaiser agreed to recognize the participating unions as the exclusive bargaining representatives of construction employees on the project site and to honor local collective bargaining agreements on matters not covered by the Agreement. Among the provisions of local contracts expressly made applicable to the project were those governing wages, work rules and job classifications, and contributions to established employee benefit funds. All employees on the project had to be referred by local union hiring halls and to be subject to union security provisions in local collective bargaining agreements.

Kaiser successfully negotiated limitations on the reach of these provisions to protect the interests of firms that normally work non-union. All obligations under the Agreement were to apply only to the Boston Harbor project. In addition, Kaiser secured guarantees (a) that contractors would compete for contracts equally, regardless of any previous relationship (or lack of relationship) with any union, and (b) that no contractor would be obliged to enter into any other agreement or relationship with any union as a condition of doing work on the project. Kaiser also obtained an express assurance that union hiring halls would be operated in a nondiscriminatory manner, thus ensuring that workers would be referred for jobs on the project without regard to whether they were union members or would be represented by the union only on the Harbor project.

4. *The Authority's Implementation of the Project Labor Agreement*

The Authority approved the Agreement negotiated by Kaiser and proceeded to include the Agreement in the competitive bidding process. Specifically, soon after the Agreement was reached, the Authority incorporated an express reference to the Agreement into Bid Specification 13.1 in the Authority's requests for bids for work on the project. App. 141a-142a. As prescribed by Mass. Gen. L. ch. 30, § 39M(c), and ch. 149, § 44A, the bid specification required each bidder to "certify that he is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed on the work." Following the negotiation of the Agreement, the Authority added the following provision:

> In the interests of such harmony and the long-term supply of skilled manpower, each successful bidder and any and all levels of subcontractors, as a condition of being awarded a contract or subcontract, will agree to abide by the provisions of the . . . Agreement . . ., and will be bound by the provisions of that agreement in the same manner as any other provision of the contract.

Prospective contractors were thus required, in submitting their bids, to confirm their willingness to adhere to the Agreement in the event that their bids were selected.

C. *The District Court's Decision*

In March 1990, more than nine months after the Authority approved the Agreement and incorporated it into Specification 13.1, and after the Authority already had awarded contracts with an aggregate price of $550 million, respondents brought this action in the United States District Court for the District of Massachusetts. J.A. 11-139. The respondent contractors, though claiming to be ready, willing, and able to fulfill project contracts, alleged that they had not and would not bid on any such contracts because of the restrictive features of the Agree-

ment.[2] The complaint asserted claims of preemption under both the NLRA and the Employee Retirement Income Security Act ("ERISA") and violations of the Constitution, a variety of federal and state statutes, and Massachusetts common law.

Respondents moved unsuccessfully in the district court for a preliminary injunction to enjoin the Authority from enforcing Bid Specification 13.1 and "those portions of the Agreement which would require [respondents] to recognize or deal with any union or to adhere to any collectively bargained terms or conditions of employment." J.A. 141-224. The district court denied the motion in a written decision issued on April 11, 1990. App. 72a-83a. After describing the provisions and background of the Agreement, the court concluded that respondents had failed to demonstrate a likelihood of success on the merits with respect to any of the claims asserted. *Id.* at 76a-81a. The court also found that respondents would not suffer any immediate or irreparable harm in the absence of an injunction. *Id.* at 82a.[3] In rejecting respondents' claim of NLRA preemption, the district court stressed Congress' express recognition, in Sections 8(e) and (f) of the NLRA, 29 U.S.C. §§ 158(e) and (f), of "the unique conditions which exist in the construction industry." App. 76a.[4]

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[2] Earlier, one of the respondent contractors had challenged the Agreement in a protest to the Commissioner of the Massachusetts Department of Labor and Industries. The Commissioner ruled that the Agreement was fully consistent with the Commonwealth's competitive bidding statutes. App. 94a-106a.

[3] The court emphasized that respondents had not bid on any project contract and that they were not precluded from bidding. Respondents conceded that in all events they would be required to pay at least the prevailing wage on the project, and the court therefore concluded that the alleged irreparable harm "appears limited to a violation of [respondents'] announced principle that they should not be required to recognize unions and union regulations that have not been designated by their employees." App. 82a.

[4] Soon after the filing of respondents' complaint, another contractors' association filed a charge with the National Labor Relations

D. The Decisions of the Court of Appeals

1. *The Panel's Ruling*

The court of appeals reversed and instructed the district court to "issue an order preliminarily enjoining enforcement of Specification 13.1." App. 49a-71a. In the court's view, respondents "present[ed] a portentous argument that there is a strong likelihood of their success on the merits" with respect to the NLRA preemption issue. *Id.* at 57a. The court did not reach any of respondents' other claims, and did not address any of the other factors relevant to the preliminary injunction inquiry.

In reaching this decision, the panel applied a *per se* rule that the states may never take action that affects the course of collective bargaining between private parties. The court based this inflexible rule on its reading of this Court's analyses of congressional intent in *Guss v. Utah Labor Relations Board*, 357 U.S. 1 (1957), *Machinists v. Wisconsin Labor Relations Comm'n*, 427 U.S. 132 (1976), and *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1985). Having so read the cases, the majority held Specification 13.1 preempted as state action requiring adherence to a predetermined collective bargaining agreement, and it brushed aside as "irrelevant" the consideration that the Agreement itself was "a valid labor contract" specifically sanctioned by the NLRA itself. App. 69a.

2. *The Opinion of the* En Banc *Court*

After the district court entered the prescribed injunction on remand, the court of appeals granted rehearing *en banc*. App. 84a-85a, 86a. In granting rehearing, the

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Board, claiming that the Agreement violated the NLRA. The Board's General Counsel refused to issue a complaint. *See* App. 88a-93a (recommending dismissal of the charge on the ground that the Agreement is lawful under the construction-industry proviso of Section 8(e) and is a valid prehire agreement under Section 8(f)).

court asked the parties to discuss whether Specification 13.1 is "reasonably related to an important proprietary interest of the state, a legitimate response to state procurement constraints, or a legitimate response to local economic needs" and whether decisions finding state action preempted were distinguishable in this respect. *Id.* at 85a.

After further briefing and argument, the court of appeals adhered to its earlier ruling by a vote of three to two. App. 1a-48a. The majority opinion closely tracked that of the panel but also relied on the NLRA's express exclusion of the states and their political subdivisions from the statutory definition of "employer" to support its position that the NLRA's express authorization for certain "employers" to enter into prehire agreements did not validate the Authority's enforcement of the Agreement. The majority also concluded that, because it viewed Specification 13.1 to be a "direct regulation of the collective bargaining process" (*id.* at 30a), whether the Specification was " 'a legitimate response to state procurement constraints or to local economic needs' " was of no legal significance (*id.* at 26a, quoting *Wisconsin Dep't of Industry v. Gould Inc.*, 475 U.S. 282, 291 (1986)).

Chief Judge Breyer dissented, writing for himself and Judge Campbell, who had joined in the earlier panel decision. The dissent, rather than read *Machinists* and *Golden State* in the absolute terms adopted by the majority, closely analyzed Congress' intent in establishing the construction industry exceptions to the NLRA and discovered no indication that Congress had intended that a state construction project should be less advantaged by these provisos than a private project. To the contrary, the dissent explained, the Authority's enforcement of the Agreement was not explicitly forbidden by the NLRA and affected labor management relations only in a manner Congress had specifically authorized for private contractors. The legislative history of that statutory au-

thorization revealed no basis for treating public agencies differently from private contractors. App. 33a-41a. Moreover, the dissent continued, the Authority's status as a buyer of services in the marketplace rather than a regulator distinguished *Machinists*, *Gould*, and *Golden State*, in which the purpose of the state action found to have been preempted was to regulate. App. 43a-44a.

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the preemptive effect of the NLRA that has not been settled by this Court. The court of appeals decided the question in a way that pays insufficient heed to this Court's oft-repeated admonition that preemption is not to be lightly presumed and that subjects state-owned construction projects to more rigid federal regulation than their private counterparts. The court did not defer to Congress' express recognition of the special circumstances that prevail in the construction industry, and it denied states the benefits Sections 8(e) and (f) of the NLRA accord to private parties, without any evidence that Congress intended to do so.

The court showed a readiness to interfere with state prerogatives when both this Court's prior decisions and the states' general exemption from regulation under the NLRA counsel a reluctance to interfere. By thus extending this Court's preemption decisions beyond the bounds of their reasoning, the court of appeals adopted a broad rule of preemption that will hamstring state agencies in many of their proprietary endeavors. More particularly, it will impede markedly the ability of state and local governments to carry out major construction projects in a manner that many believe to be crucial to completing them on time and on budget.

The particular construction project here at issue, which is of paramount public importance, is illustrative. The court-ordered cleanup of Boston Harbor offers substantial

environmental benefits to metropolitan Boston at a cost that imposes unprecedented financial burdens on its citizens. The freedom of the Authority to achieve those benefits by enforcement of the Agreement, the method it chose as best calculated to limit those burdens, is a matter of local concern of the highest order. The court of appeals unjustifiably deprived the Authority of that freedom.

The impact of this restriction on state power extends far beyond the Authority and Boston Harbor, for project labor agreements are an increasingly common tool for ensuring harmonious labor relations throughout the construction of large public and private projects.[5] The Boston Harbor project is one of a growing number of undertakings in which the project owners or their construction managers have found it advantageous to negotiate an agreement that will minimize the potential for strikes, picketing, work stoppages, and other forms of labor strife during the course of construction. Other prominent examples of projects built with such agreements include the Alaska Pipeline; Disneyworld; the Southern California Rapid Transit District heavy and light rail systems; the Baltimore Harbor Tunnel Rehabilitation Project; West Virginia University Hospital; airport construction in Chicago, Detroit, and Orlando; and public hydroelectric projects in Arizona and California.

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[5] Unless this Court grants the petition, it appears that the majority's reasoning will be replicated. The Eighth Circuit very recently enjoined a municipality from requiring contractors to enter into a project labor agreement. The court divided two-to-one, with the majority expressly relying upon the majority opinion here, and the dissenter, the dissent of Chief Judge Breyer. *See Glenwood Bridge, Inc. v. City of Minneapolis*, Aug. 8, 1991 BNA Daily Labor Report at D-1 (8th Cir. Aug. 2, 1991). That the two courts of appeals to have addressed the issue of state enforcement of project labor agreements both divided over its resolution emphasizes the need for the question to be settled by this Court.

Congress expressly authorized the use of prehire collective bargaining agreements by private construction contractors, and neither the NLRA nor its legislative history contains the slightest indication that Congress sought to make this option unavailable to public project owners. Because preemption is entirely a matter of congressional intent, the absence of any suggestion that Congress wished to prevent states, which are generally not subject to NLRA regulation, from using the same mechanism Congress went out of its way to provide for private construction contractors, who are subject to the Act, should have been dispositive. This Court should intervene to correct the court of appeals' unwarranted intrusion into the states' legitimate activities as purchasers of construction services.

Viewed more generally, this case presents a unique opportunity for the Court to provide needed guidance with respect to two fundamental issues of labor law preemption. First, the Court can establish the boundaries of the so-called *Machinists* preemption doctrine, *see Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), determining to what extent Congress' presumed intent to insulate collective bargaining disputes from state manipulation ousts state action that touches upon other aspects of labor relations. Second, with the lower courts having recognized that the Authority acted as a buyer and not as a regulator in promulgating Specification 13.1, the case presents squarely the question this Court specifically left open in *Wisconin Dep't of Industry v. Gould Inc.*, 475 U.S. 282 (1986), whether and to what degree the NLRA preempts actions taken by a state operating in a proprietary rather than a regulatory capacity. In both respects, the case provides an occasion for the Court to ground its labor law preemption doctrine more firmly in reemerging principles of federalism, considering in the light of those principles the appropriate roles of the state and federal governments in matters that touch upon labor relations.

I. THE COURT OF APPEALS' CONVERSION OF THE *MACHINISTS* DOCTRINE INTO A *PER SE* RULE OF PREEMPTION WAS UNPRECEDENTED AND UNWARRANTED.

The basic teaching of this Court on labor law preemption is well settled. To avoid interference with implementation of the NLRA by the Board, Congress is presumed to have forbidden the states to regulate conduct "arguably prohibited" or "arguably protected" by the NLRA. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). However, Congress is equally presumed to have permitted state regulation of such matters when the issue is of "peripheral concern" to the NLRA, or where the conduct in question is so "deeply involved in local feeling and responsibility that, in the absence of compelling congressional direction, [this Court] could not infer that Congress had deprived the States of the power to act." *Id.* at 243-44. *See, e.g., Linn v. Plant Guard Workers*, 383 U.S. 53 (1965) (malicious libel actionable even if conduct arguably prohibited by the NLRA); *Farmer v. United Brotherhood of Carpenters, Local 25*, 430 U.S. 290 (1977) (similarly, intentional infliction of emotional distress); *cf. Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957) (pre-*Garmon*; violent and coercive picketing actionable under state law).

In certain specific circumstances, this Court has held, *Garmon*'s "arguably prohibited/arguably protected" construct did not suffice to describe fully the preemptive effect Congress intended for the NLRA. More particularly, collective bargaining between an employer and the union representing its employees is the cornerstone of the NLRA, and much of the arsenal of this lawful economic conflict is neither prohibited nor protected by the statute. Accordingly, this Court added "self-help economic activities" to the categories of conduct the state is precluded from regulating. *Machinists*, 427 U.S. at 147. These activities are neither prohibited nor protected but presumed

to be part of the economic weaponry that Congress accorded labor and management. *Id.* Thus, in *Machinists*, this Court forbade Wisconsin from enjoining a union's concerted refusal to work overtime in support of collective bargaining positions. Then, reasoning directly from *Machinists*, in *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1985), this Court held that Los Angeles' threat not to renew Golden State's taxi franchise unless it settled a strike with its employees' union improperly impaired the employer's use of "economic weapons Congress meant to be unregulable." *Machinists*, 427 U.S. at 147.[6]

Both *Machinists* and *Golden State*, it must be kept in mind, involved the state's regulatory intervention to influence the outcome of an ongoing, existing collective bargaining dispute between an employer and its union. Neither decision expressly restricts *Machinists* preemption to this context. Nor, however, does either expressly instruct that broader application of the doctrine is appropriate.

In fact, this Court has found *Machinists* preemption inapplicable to situations not involving an existing collective bargaining dispute. The Court rejected claims that the *Machinists* doctrine forbade the states to dictate some terms of collective bargining agreements. *See Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) (state may require mental health coverage in collectively bargained health insurance policies); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) (similarly, plant closing benefits). This Court also held that Congress did not intend to prohibit the states from taxing employers to pay unemployment compensation to strikers, despite the un-

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[6] Although consistently referred to as "*Machinists* preemption," the principle was accepted at least as far back as the Court's decision in *Teamsters Local 20 v. Morton*, 377 U.S. 252 (1964) (state court may not enjoin secondary economic pressure neither prohibited nor protected by NLRA).

disputed impact on collective bargaining. *New York Telephone Co. v. New York Dep't of Labor*, 440 U.S. 519 (1979). Conversely, a state may deny unemployment compensation to otherwise eligible employees because they have financed the strikes that cause their unemployment. *Baker v. General Motors Corp.*, 478 U.S. 621 (1986). Moreover, despite the critical impact the hiring of "permanent replacements" during a strike may have on collective bargaining, this Court held that state law actions brought by such replacements concerning their employment status are not preempted. *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983).

This Court's consistent refusal to extend *Machinists* beyond the narrow band of situations in which the state consciously seeks to deprive either an employer or its union of weapons in an existing labor dispute accords with the structure of federal labor law preemption. For outside *Garmon*, preemption has a limited function:

> Federal labor law in this sense is interstitial, supplementing state law where compatible, and supplanting only when it prevents the accomplishment of the purposes of the federal Act.

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. at 756.

Here, the majority of the circuit court extended *Machinists* preemption to circumstances where this Court has never applied it. In so doing, the majority nowhere explained why the Authority's action "prevents the accomplishment of the purposes of the federal Act." To be sure, as the majority observed, the NLRA generally requires and permits an employer to recognize a union only when it is selected by a majority of the employer's employees, and the Agreement, in effect, could require aspiring contractors to recognize a union in the absence of such majority status. But all of the judges of the court of appeals recognized that the Agreement between Kaiser and the Council was a lawful prehire agreement ex-

pressly authorized by an exception to the general rule, an exception that permits precisely such non-majority status recognition.[7] App. 24a.

Congress created in Sections 8(e) and (f) of the NLRA specific exceptions to take account of unique conditions in the construction industry. 29 U.S.C. §§ 158(e) and (f); *see Connell Construction Co. v. Plumbers and Steamfitters Local 100*, 421 U.S. 616 (1975); *NLRB v. Ironworkers*, 434 U.S. 335 (1978); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 (1982); *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983). Those special provisions form the basis for agreements such as that at issue here, and both the Board and the federal courts have upheld their validity repeatedly. *See, e.g., AGC v. Otter Tail Power Co.*, 611 F.2d 684 (8th Cir. 1979); *ABC of Kentuckiana v. Ohbayashi Corp.*, C.A. No. 87-38 (E.D. Ky. 1987); *Morrison-Knudsen Co.*, 13 NLRB Advice Mem. Rptr. ¶ 23,061 (NLRB-GC 1986). In fact, prior to the decision below, neither the Board nor any court ever had found a project labor agreement to violate federal law or national labor policy.

What happened here is what Congress might well have contemplated. Once Kaiser had determined that the circumstances it faced in managing the Harbor cleanup were precisely of the sort that prompted passage of Sections 8(e) and (f) and then had persuaded the Authority that the Agreement was a necessary response to those circumstances, Kaiser negotiated the Agreement with the Council. At that point, state "procurement constraints," *see Gould*, 475 U.S. at 291, left the Authority little choice as to the manner in which it would give effect to the Agreement. The Authority could attain the benefits of the agreement Kaiser had negotiated only by including in all

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[7] Indeed the Board's General Counsel already had rejected allegations that the Agreement was unlawful and dismissed unfair labor practice charges against Kaiser. App. 88a-93a.

of its solicitations for bids a specification requiring that contractors agree to observe the terms of the Agreement.[8]

Instead of explaining why *Machinists* would invalidate the Agreement because the project owner is a public authority, the majority applied the *Machinists* doctrine as if it were a *per se* rule of labor law preemption.[9] Thus, its analysis consists mainly of a repetition of the proposition fairly drawn from *Machinists* and *Golden State* that states are sometimes forbidden to make the same choices as private parties when those choices would affect private collective bargaining. App. 15a. What the majority failed to do was to proceed to the next step of the analysis: whether Congress *intended* to deprive the states of the

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[8] Massachusetts' competitive bidding laws, to which the Authority's Enabling Act explicitly subjects it, make clear that the competitive bidding process must be carried out by the awarding authority. Mass. Gen. L. ch. 30, § 39M; ch. 92 App., §§ 1-8(g); ch. 149, §§ 44A-44H; *Modern Continental Construction Co. v. Lowell*, 391 Mass. 829, 836, 465 N.E.2d 1173 (1984). Even if state competitive bidding laws had permitted the delegation of this task to Kaiser, which they do not, they require detailed bid specifications describing the work to be done. Mass. Gen. L. ch. 30, § 39M(b); ch. 149, § 44B(1); *Datatrol, Inc. v. State Purchasing Agent*, 379 Mass. 679, 400 N.E.2d 1218 (1980). At the time the Authority retained Kaiser and began awarding construction contracts under the schedule established by the district court, the later portions of the project were not even designed, much less able to be described in detailed construction specifications.

[9] Perhaps the majority's *per se* approach can be explained by its heavy reliance on *Guss v. Utah Labor Relations Board*, 353 U.S. 1 (1957). See App. 11a, 12a, 14a, 25a. *Guss* is a pre-*Garmon* decision that held that the states could not regulate the labor relations of very small employers even where the Board chose not to exercise its statutory jurisdiction over those employers. Congress immediately rejected the Court's assumption concerning its intent, *see* 29 U.S.C. § 164(c); 73 Stat. 541, and no court has since embraced *Guss* as enthusiastically as the court of appeals in the decision below. For a description of the reaction to *Guss* on the floor of the Senate, see Justice White's dissenting opinion in *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 315-16 (1971).

right to act as challenged.[10] Instead, the majority assumed that state action that affects collective bargaining always impedes the accomplishment of congressional intent. But while it is quite clear why Congress would forbid a state to use its regulatory power to favor one side or the other in an existing labor dispute, it is a far different proposition to conclude that Congress intended to outlaw otherwise lawful prehire agreements when the customer for construction services is the state rather than a private party.[11]

Certainly, the text of the statute does not lead to this result. The majority pointed out that the state is not an "employer", 29 U.S.C. § 152(2), and therefore is not strictly within the terms of the construction industry exception in Section 8(f). App. 20a. But, as the dissent replied, since for the same reason the state cannot violate the prohibition in Section 8(a)(2) against recognizing a non-majority union, there would seem to be little reason why the drafters of Section 8(f) would place the state within an exception to a rule to which the state was not subject in the first place. App. 40a. More importantly, the reason states are not "employers" is that Congress chose to give states special freedom and flexibility by excluding them from the NLRA's regulatory regime. It is peculiar logic indeed to combine the express authoriza-

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[10] The majority's analysis makes real the concerns expressed in Chief Justice Rehnquist's dissent in *Golden State*:

> The entire body of this Court's labor law pre-emption doctrine has been built on a series of implications as to congressional intent in the face of congressional silence, so that we now have an elaborate pre-emption doctrine traceable not to any expression of Congress, but only to statements by this Court in its previous opinions of what Congress must have intended.

475 U.S. at 623.

[11] *Cf. Plumbers Etc., 298 v. County of Door*, 359 U.S. 354 (1959) (county entitled to protection of the NLRA when subjected to unlawful secondary pressure to discontinue use of non-unionized primary contractor).

tion of prehire agreements in Sections 8(e) and 8(f) with the special dispensation for states in Section 2(2) and conclude that Congress intended to impose *restrictions* on the states not applicable to other contractors or project owners.

Chief Judge Breyer's dissent engaged in precisely the analysis that the majority's *per se* approach avoided. In his words, "[i]nsofar as the [Authority's] purchasing decision affects labor-management relations, it does so only to the extent that Congress foresaw and (with respect to general contractors) explicitly authorized." App. 34a. For this reason, the dissent said, Specification 13.1 does not interfere with the free play of economic forces in a way that Congress did not intend to permit. Rather, when the Authority, "acting in the role of purchaser of construction services, acts just like a private contractor would act, and conditions its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find, it does not 'regulate' the workings of the market forces that Congress expected to find; it exemplifies them." *Id.* at 35a.

The dissent followed this Court's practice of reviewing legislative history to aid in determining legislative intent. *See, e.g., New York Telephone Co. v. New York Dep't of Labor*, 440 U.S. at 537-45. Carefully examining the legislative history of Section 8(f) and the construction-industry proviso to Section 8(e), the dissent found that that history confirmed its conclusion about the legality of the Authority's action. App. 37a-41a. Congress' reasons for authorizing prehire agreements in the construction industry, the dissent explained, "have nothing at all to do with the private or public nature of the general contractor." *Id.* at 37a. Instead, those reasons concern the nature of the industry itself—"the short-term nature of employment, the impracticability of holding certification elections, the contractors' need for predictable cost and a steady supply of labor, and the longstanding custom of prehire bargaining in the industry." App. 39a.

These conditions are "likely to remain the same whether a public or private contractor lets contracts for the work," and therefore, in the dissent's view, acting as "an ordinary private purchaser of construction services," the Authority did not frustrate the NLRA's statutory scheme when it used the Agreement. App. 40a, 41a.

Ultimately, it is the result reached by the majority that has frustrated the will of Congress. Absent any evidence that Congress forbade the state conduct challenged here, the court has carved out an unintended exception to the NLRA. The respondents gained a business advantage by precluding enforcement of a lawful prehire agreement solely because the construction customer is the state. No such exception appears in the NLRA. No legislative history supports such an exception. This Court should make clear that its prior decisions provide no basis for such a restriction on action by the states.

II. THE COURT OF APPEALS' EXTENSION OF THIS COURT'S PREEMPTION DOCTRINE TO PROPRIETARY RATHER THAN REGULATORY CONDUCT OF THE STATES IS UNPRECEDENTED AND UNWARRANTED.

This Court's preemption doctrine has focused exclusively on the states' *regulation* of labor relations. The avoidance of conflicting systems of regulation is the quintessence of that policy. "The constitutional principles of pre-emption, in whatever particular field of law they operate, are designed with a common end in view: to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 285-86 (1971). *See, e.g., Garmon*, 359 U.S. at 244 ("To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law"); *Brown v. Hotel Employees*, 468 U.S. 491, 503 (1984) (state regulation is preempted "[i]f the state law

regulates conduct that is actually protected by federal law").

Consistent with the basis of preemption doctrine, this Court has never extended labor law preemption to forbid conduct that is not regulatory in nature, but proprietary. Although *Gould* involved the use of the state's purchasing power, this Court's holding that a state may not punish repeat violators of the NLRA by barring them from state contracts involved classic *Garmon* preemption of state regulation. Congress, having erected a system of rights and remedies, is presumed not to intend the states to augment that system. *See* 475 U.S. at 287 (state prohibited from "adding a remedy to those prescribed by the NLRA"). Thus, *Gould* does not address the conduct of the state as buyer but as regulator. As the dissent below emphasized, this Court's unanimous opinion left open the issues whether and, if so, when federal law preempts state conduct that is truly of a proprietary nature:

> We do not say that state purchasing decisions may never be influenced by labor considerations, any more than the NLRA prevents state regulatory power from ever touching on matters of industrial relations. Doubtless some state spending policies, like some exercises of the police power, address conduct that is of such "peripheral concern" to the NLRA, or that implicates "interests so deeply rooted in local feeling and responsibility," that pre-emption should not be inferred. *Garmon*, 359 U.S., at 243-244; see also, *e.g.*, *Belknap, Inc. v. Hale*, 463 U.S. 491, 498 (1983). And some spending determinations that bear on labor relations were intentionally left to the States by Congress. *See New York Tel. Co. v. New York State Labor Dept.*, 440 U.S. 519 (1979). But Wisconsin's debarment rule clearly falls into none of these categories. We are not faced here with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs, or with a law that pursues a task Congress intended to leave to the States.

> The manifest purpose and inevitable effect of the debarment rule is to enforce the requirements of the NLRA.

475 U.S. at 291.

That Congress did not intend to regulate the proprietary behavior of the states is best evidenced by the NLRA's definition of "employer" to exclude states. 29 U.S.C. § 152(2). Congress has thereby expressed disinterest whether a state's employees are mandatorily unionized or not, whether a state permits its employees to strike or not, or, for that matter, whether a state affords its employees any of the rights granted private employees.

The only prior federal appellate decision to have treated this issue in detail found the NLRA's definition of the term "employer" persuasive in concluding that the NLRA did not preempt action by the state as purchaser. The Third Circuit, sitting *en banc* in *Amalgamated Transit Union, Div. 819 v. Byrne*, 568 F.2d 1025 (3d Cir. 1977), held that New Jersey's threat to withhold state subsidies from transportation companies that entered into collective bargaining agreements that included unlimited cost of living increases was not preempted by the NLRA. The court reasoned that *Machinists* preemption did not apply to state action where the state's "interest in the collective bargaining agreements is similar to that of any private purchaser of services which expresses an interest in the terms of a collective bargaining agreement under consideration by the provider of the services." *Id.* at 1029. Emphasizing the statutory exclusion of "states" from the NLRA's definition of "employer," the court observed that "to the extent that New Jersey is here acting like a private purchaser of services, Congress has explicitly exempted it from the proscriptions of the NLRA." *Id.*

The exclusion of the states and their instrumentalities from the sweep of the NLRA cannot be taken as anything other than a conscious judgment by Congress that the

states' own labor relations decisions are of no concern to federal law. Congress regularly makes judgments whether to subject the states to the same employment statutes as private entities. *Compare, e.g.*, 29 U.S.C. § 203(d) (FSLA); 29 U.S.C. § 630(b) (ADEA); 42 U.S.C. § 2000e (a), (b) (Title VII); 38 U.S.C. § 2021(1)(B) (veterans' reemployment) *with, e.g.*, 29 U.S.C. § 652(5) (OSHA); 29 U.S.C. § 2006(a) (polygraph statute). Indeed, inclusion of the states within the coverage of an employment statute may produce the single most controversial subject of congressional debate. *See Legislative History of the Equal Employment Opportunity Act of 1972*, pp. 1102-75.

The Board's expansive interpretation of Congress' state exclusion is instructive. To the extent that the states regulate pervasively the terms and conditions of their contractors' employment, the contractors substantially share in the states' statutory exclusion from NLRA coverage. *See, e.g., Correctional Medical Systems, Inc.*, 299 NLRB No. 95 (1990); *Southwest Ambulance Co.*, 295 NLRB No. 21 (1989); *National Transp. Service, Inc.*, 240 NLRB 656 (1979); *cf. PHP Healthcare Corp.*, 285 NLRB 182 (1987) (federal agency regulation). These cases reason that, if the state effectively dictates a private employer's labor relations policy, certification of a bargaining agent would be an exercise in futility. By this reasoning, the Board has effectively permitted the states to forbid unionization of their contractors. There is a stark contrast between the Board's willingness to carve an exception to the representational provisions of the NLRA as applied to private employers in order to accommodate Congress' exclusion of the states from the coverage of the NLRA, and the court of appeals' refusal to allow the Authority to enforce an agreement specifically permitted by the NLRA. Of course, the Board's understanding of the NLRA and the exclusion it grants to the states is entitled to substantial deference by the courts. *See NLRB v. E.C. Atkins & Co.*, 331 U.S. 398,

403-04 (1947) (Board entitled to "great respect"); *NLRB v. Natural Gas Utility District*, 402 U.S. 600, 606 (1971).

Not only does the majority's extension of *Machinists* preemption to proprietary conduct run counter to the Board's interpretation of the NLRA, but it also contains no self-limiting rationale. The contrast between this case and *Golden State* is instructive. In *Golden State*, the City Council, which had no proprietary interest in the terms of the taxicab company's employment contract, exercised its unique authority over franchise renewals to influence the contract negotiations. Here, however, the Authority is acting strictly as a market participant, engaging in the same conduct, for the same economic reasons and with the same authority, as any similarly-situated private party. Had *Golden State* involved proprietary behavior by Los Angeles—for example, the cancellation of a city contract with Golden State to provide taxi service because of the reduced availability of taxis caused by the strike—there seems little likelihood that this Court would have found the city's action preempted. To hold such a cancellation preempted would allow the taxicab company to impose the costs of its private labor relations on the city. Yet nothing in the majority's reasoning would distinguish that case from this. The court of appeals' decision allows respondents to impose the costs and risks of their decision to work non-union on the Authority.

The Authority is expending billions of dollars of state funds to build a treatment plant designed to serve half the population of Massachusetts for half a century. To protect and enhance this massive investment by minimizing labor disharmony over more than a decade of construction, the Authority approved and applied the Agreement negotiated by a private construction employer and the construction trades. This Court should not permit the lower federal courts to use its own silence to deny the Authority the right to conduct its own affairs in a man-

ner that the NLRA expressly makes available to private employers.

III. PRINCIPLES OF FEDERALISM REQUIRE REASONED LIMITATIONS ON THE *MACHINISTS* DOCTRINE.

Beyond reining in the unwarranted doctrinal expansion that the court of appeals' decision threatens, this Court should examine the economic and governmental interests at stake here and what resolution of them advances our "system of dual sovereignty." *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991). The Authority is charged with a monumental task. The economic burden on its rate payers is both enormous and unsupported by the federal government that ordered its imposition. Moreover, to meet the district court's remedial orders, the Authority necessarily had to reconcile the peculiar geography of the site, the labor-management climate of the region, and the timetable the court imposed. The mechanism Kaiser devised to accomplish this reconciliation the court of appeals struck down, purporting to further Congress' intent.

But the federal interest served by the majority opinion is difficult to discern. Congress has sanctioned prehire agreements; the Authority's adoption of the agreement negotiated by Kaiser adds but one to the many others already in existence. The Authority told ABC's members they would have to enter into a prehire agreement to work on the Harbor cleanup; Congress already has told ABC, in effect, that its members would have to do so to work on many other construction projects.

The court of appeals' absolute subordination of extraordinary state interests to federal interests that are theoretical at best is impossible to square with this Court's most recent pronouncements about federalism. The court showed little appreciation of any of the values of federalism that this Court recently examined in *Gregory v. Ashcroft*. These virtues, as summarized by the Court—"a

decentralized government sensitive to . . . diverse needs . . .; opportunity for citizen involvement . . .; innovation and experimentation in government", 111 S. Ct. at 2399 —all are exemplified by the Authority and advanced by the Agreement. To the extent the majority noticed these values at all, it apparently dismissed them as "Balkanization." App. 69a.

Indeed, *Gregory*'s analysis may have direct application. Although this Court's preemption doctrine and its various rules of decision under the Commerce Clause such as that examined in *Gregory* have taken seemingly divergent paths, no apparent reason compels that divergence. During the same period that the Court was shaping its preemption doctrine, it also was seeking to determine the extent to which Congress had the power under the Commerce Clause to regulate the terms and conditions of employment of state employees. In 1976 this Court held in *National League of Cities v. Usery*, 426 U.S. 833 (1976), that the federal government cannot dictate the terms and conditions of employment for state employees working in a "governmental function." The rule proved difficult to apply, and the Court soon abandoned it in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). The rule of law after *Garcia* seems to be that Congress has plenary power under the Commerce Clause to regulate the terms and conditions of employment of state and local employees.

The Court crystallized its analysis in *Gregory*. There, the Court construed the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*, not to apply to state court judges. It reasoned as follows:

> [I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercise of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. "[T]o give the state-displacing weight of federal law to mere con-

> gressional *ambiguity* would evade the very procedur for lawmaking on which *Garcia* relied to protec states' interests." L. Tribe, American Constitutiona Law § 6-25, p. 480 (2d ed. 1988).

111 S. Ct. at 2403. The Court therefore ruled that th proper ordering of federalism allowed Congress plenar power to regulate the employment rights of judges, bu declined to hold that Congress had exercised that powe absent a "plain statement" of that intent.

It would be most instructive, now, to consider thi case in light of *Gregory*'s analysis. Both involve the po tential exercise of plenary federal power; both therefor involve the question whether Congress intended to regu late the states' internal behavior. Both involve potentia federal interference with matters of critical local inte est, the qualifications of judges in *Gregory*, the extraor dinarily expensive rehabilitation of a polluted natura resource here. *Gregory* sensibly resolved the respectiv powers of the federal and state government. Congres had plenary power, but to exercise that power it had t do so clearly. Here, the majority held that Congress im plicitly intended to usurp state authority, notwithstan ing the weight of evidence to the contrary.

It is, no doubt, too late to apply directly *Gregory* "plain statement" rule to NLRA preemption. Howeve the *Gregory* analysis serves as a reminder that in federal system the ousting of state law by the feder legislature is not lightly to be assumed. This case pr vides an appropriate occasion for setting preemptio doctrine more squarely within the federal order as d lineated in *Gregory*: a system where the states opera as of right except where that operation directly impai some clearly articulated congressional policy.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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August 13, 1991

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1392

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.,
PLAINTIFFS, APPELLANTS

v.

THE MASSACHUSETTS WATER RESOURCES AUTHORITY,
ET AL., DEFENDANTS, APPELLEES

Appeal from the United States District Court
for the District of Massachusetts
[Hon. A. David Mazzone, *U.S. District Judge*]

Before
Breyer, *Chief Judge*,
Campbell, Torruella, Selya and Cyr,
Circuit Judges

Maurice Baskin, with whom *Carol Chandler*, *Mary L. Marshall*, *Stoneman, Chandler & Miller*, *Thomas J. Madden* and *Venable, Baetjer, Howard & Civiletti*, were on briefs for appellants.

Richard D. Wayne and *Hinckley, Allen, Snyder & Comen*, were on brief for Utility Contractors Association of New England, Inc., amicus curiae.

Ralph F. Abbott, Jr., *Jay M. Presser* and *Skoler, Abbott & Presser, P.C.*, were on brief for National Association of Manufacturers, amicus curiae.

James J. Kelley and *John M. Stevens*, with whom *E. Carl Uehlein, Jr.*, *Morgan, Lewis & Bockius*, *Arthur G. Telegen*, *Foley Hoag & Eliot*, *Catherine L. Farrell*, General Counsel and *Virginia S. Renick*, Senior Staff Counsel, were on joint brief for appellees Kaiser Engineers, Inc. and Massachusetts Water Resources Authority.

Donald J. Siegel, with whom *Mary T. Sullivan*, *Segal, Roitman & Coleman*, *Laurence J. Cohen*, *Victoria L. Bor*, *Sherman, Dunn, Cohen, Leifer & Yellig*, *Walter Kamiat* and *Laurence Gold*, were on briefs for appellee Building and Construction Trades Council of the Metropolitan District.

Scott Harshbarger, Attorney General and *Douglas H. Wilkins*, Assistant Attorney General, were on supplemental brief for the Commonwealth of Massachusetts, amicus curiae.

Bond, Schoeneck & King, *Sherburne, Powers & Needham*, *Raymond W. Murray*, *Robert W. Kopp* and *Anthony E. Battelle*, were on brief for Bechtel Corporation/Parsons Brinckeroff, Quade & Douglas, Inc., a Joint Venture, amicus curiae.

May 15, 1991

OPINION EN BANC

TORRUELLA, *Circuit Judge.* Plaintiffs-Appellants Associated Builders and Contractors of Massachusetts/ Rhode Island, Inc. ("ABC")[1] appeal the decision of the United States District Court for the District of Massachusetts denying ABC's request for a preliminary injunction. For the reasons stated below, we reverse this decision and remand for action consistent with our opinion.

I. THE FACTS

The Massachusetts Water Resources Authority ("MWRA") is a governmental agency authorized by the Massachusetts legislature to provide water supply services, sewage collection, and treatment and disposal services for the eastern half of Massachusetts. Following a lawsuit arising out of its failure to prevent the pollution of Boston Harbor, *United States* v. *Metropolitan District Commission*, C.A. No. 85-0489-MA (Mazzone, J.), the MWRA was ordered to meet a detailed timetable to carry out the clean-up of that body of water. This task, known as the Boston Harbor Clean-Up Project ("Project"), is estimated to involve $6.1 billion of public works over a ten year period. The means and methods of carrying out the Project are set forth in the MWRA's enabling statute, Mass. Gen. Laws ch. 92, app. §§ 1-1, *et seq.*, and the Commonwealth's public bidding laws. Mass. Gen. Laws ch. 149, §§ 44A-44L and ch. 30, § 39M. Pursuant to these laws, the MWRA provides the funds for construction (assisted by state and federal grants), owns the property to be built, establishes all bid conditions, decides all contract awards, pays the contractors, and generally exercises control and supervision over all aspects of this project.

In the spring of 1988, the MWRA retained Kaiser Engineers, Inc. ("Kaiser") as its program/construction

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[1] Also its national association and five individual contractors.

manager. Kaiser's primary function is to manage and supervise the ongoing construction activity. In the course of performing its function, however, Kaiser could be expected to employ craft labor in certain situations. Its agreement with the MWRA permits it to act as an execution contractor, or to perform certain direct hire work as needed in cases of default or incomplete performance by other contractors, clean-up work and other limited or emergency situations.

Another important function of Kaiser is to advise the MWRA on the development of a labor relations policy which will maintain worksite harmony, labor-management peace, and overall stability during the ten-year life of the Project. The MWRA had already experienced work stoppages and informational picketing at various sites [2] and was concerned that, because of the scale of the Project and the number of different craft skills involved, it was vulnerable to numerous delays thus placing the court-ordered schedule in jeopardy and subjecting the MWRA to possible contempt orders. This concern was enhanced by the geographic location of the existing and proposed treatment facilities which makes them vulnerable to picketing and other concerted activity.[3]

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[2] In November of 1988, two labor unions picketed the Project and precipitated a brief work stoppage, which was ended by establishment of separate entrances to the job site. This is a well recognized method of maintaining continuity of work in the construction industry. Other threats were made to disrupt the work, but no other significant disruption actually occurred.

[3] At Deer Island access to the site was by a single two-lane road passing through crowded Winthrop streets, and next to the existing Suffolk County House of Correction. Access to the facility at Nut Island is similarly constrained. Facilities being built off-island to transport workers, construction materials and equipment across the harbor to Deer Island would have to be designed or adapted to the potential for labor unrest with unions other than member unions of the Trades Council such as those representing maritime workers.

The above circumstances led Kaiser to recommend to the MWRA that it be permitted to negotiate with the building and construction trades unions, through the Building and Construction Trades Council and affiliated labor organizations[4] ("Trades Council"), in an effort to arrive at an agreement which would assure labor stability over the life of the Project. Any agreement would be subject to review and final approval by the MWRA.

The MWRA accepted Kaiser's recommendations and in early May 1989 Kaiser proceeded to meet with negotiating teams from the unions, including the Trades Council. The Master Labor Agreement was the result of their negotiations. After review by the MWRA staff, and upon its recommendation, the MWRA Board of Directors on May 28, 1989 adopted the Master Labor Agreement as the labor policy for the Project and directed that Specification 13.1 be added to the bid specification for all new construction work. Specification 13.1 provides that:

> [E]ach successful bidder and any and all levels of subcontractors, as a condition of being awarded a contract or subcontract, will agree to abide by the provisions of the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement ["the Master Labor Agreement"] as executed and effective May 22, 1989, by and between [Kaiser], on behalf of [MWRA], and the [Trades Council] . . . and will be bound by the provisions of that agreement in the same manner as any other provision of the contract. A copy of the agreement is attached and included as part of these Contract Documents . . .

The Master Labor Agreement establishes as "the policy of the [MWRA] that the construction work covered by this Agreement shall be contracted to Contractors who agree to execute and be bound by the terms of this Agreement." It is the duty of Kaiser on behalf of

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[4] Thirty-four in all.

MWRA to "monitor compliance with this Agreement by all Contractors who through their execution of this Agreement, together with their subcontractors, have become bound hereto." The parties state the need to meet the "specified and limited time frames" established by the district court's order in the Boston Harbor Clean-up case. Also agreed to are binding methods for the settlement of "all misunderstandings, disputes or grievances which may arise [and] . . . the Union, agree[s] not to engage in any strike, slowdown or interruption of work [or] the [employers] . . . to engage in any lockout."

Most importantly, the Trades Council is recognized "as the sole and exclusive bargaining representative of all craft employees," and its hiring halls are made the initial and principal source for the Project's labor force. All employees are subject to the union security provisions of the agreement which require that they become union members within seven days of their employment. Employees may seek redress for their grievances only through the recognized labor organizations, and the contractors are bound by the Trades Council member unions' wage and benefit provisions and apprenticeship program. The contractors are required to make contributions to various union benefit trust funds and to observe the unions' work rules and job classifications.

The Master Labor Agreement became "effective [on] May 22, 1989, and shall continue in effect for the duration of the Project construction work." As previously indicated, the Project is expected to take ten years to complete.

II. PROCEDURAL BACKGROUND

ABC is an organization composed of individual construction contractors and trade associations representing over 18,000 "merit shop" (i.e., non-union) construction industry employers. On March 5, 1990, ABC brought suit in the United States District Court for the District of

Massachusetts against the MWRA, Kaiser and the Trades Council, seeking injunctive relief against enforcement of bidding Specification 13.1. ABC claims that, as applied to its membership, Specification 13.1 effectively bars them from seeking and obtaining any bids in this multi-billion dollar, ten-year endeavor. ABC alleges irreparable injury and damages from what it perceives to be a violation of various federal and state statutes. These contentions, and the district court's treatment of them, can be summarized as follows:

(1) *Preemption under the NLRA.* ABC alleged that the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 151 *et seq.*, prohibits the MWRA from interfering with the labor negotiations process, specifically arguing that requiring employers to accept the terms of a collective bargaining agreement with a union that has not been designated as the bargaining agent by employees is illegal. The district court held that Section 8(e) and (f) of the NLRA[5] permit such restrictive agreements in the construction industry and that even if the Master Labor Agreement were to affect NLRA-regulated conduct, such impact must be considered against the manifest importance of the Boston Harbor clean-up. "The presence of *non-represented* employees simply increases the potential for continuous strife and crippling work stoppages." The court ruled that the Master Labor Agreement was lawful under the circumstances.

(2) *Preemption under ERISA.* ABC claimed that since the Agreement required employers to contribute to trust funds, the Agreement in effect regulated the terms and conditions of employee benefit plans covered under Section 514(c) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144(c). The court disagreed, holding that the Agreement is not so broad and only applies to a single discrete project and thus does not contravene ERISA.

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[5] 29 U.S.C. §§ 158(e) and (f).

(3) *Equal protection and due process clause allegations.* ABC claimed that the bidding procedures discriminate against non-union contractors and effectively preclude such contractors from bidding, thus violating the equal protection and due process clauses. These claims were also rejected by the district court, which ruled that non-union contractors are not a protected class, that bidding procedures were open to all contractors, and that since ABC had failed to make any bid as of yet, a constitutionally protected right was lacking.[6]

(4) *The Sherman Act claim.* ABC alleged that the Master Labor Agreement and Specification 13.1 constitute a conspiracy among appellees to reduce competition in the construction industry by effectively precluding non-union contractors, in violation of the Sherman Act, 15 U.S.C. § 1. Below, the court reiterated that appellants were not excluded from the bidding process and furthermore, since the Master Labor Agreement "serves legitimate business, and public purposes" there was no anti-trust violation. Moreover, the district court found that the MWRA, as a state entity, is immune from an anti-trust claim and that Section 8(e) of the NLRA along with labor's non-statutory anti-trust exemption under the Sherman Act protect Kaiser and the Trades Council as well.

(5) *State law claims.* The district court rejected ABC's state law violations claim, ruling that the Massachusetts Public Bidding statute, Mass. Gen. Laws ch. 30, § 39M and ch. 149, §§ 44A-L, specifically required that the winning bidder must furnish labor that can work in "harmony with all the other elements of labor employed or to be employed on the work." It further ruled that there was no interference with business relationships because no relationships existed as of yet.

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[6] Analogous state claims were also rejected.

Thus, the district court denied a preliminary injunction holding that, first, the appellants were not likely to succeed on the merits. Second, ABC had not shown immediate and irreparable harm because it had not been awarded a contract; even if it had, it would have an adequate remedy at law. Third, the balance of harm to the appellants was outweighed by the harm to the appellees, since the appellees would suffer intolerable delays, disruptions, and increased costs in the Boston Harbor clean-up without Specification 13.1. And last, issuing an injunction would adversely affect the public interest in the swift clean-up of Boston Harbor.

ABC appealed the denial of the preliminary injunction to a panel of this court. In its opinion, the original panel reached only the issue of preemption under the NLRA, finding (as do we) that issue dispositive of the appeal. In its petition for rehearing *en banc*, the Trades Council raised a new point relevant to NLRA preemption: whether Specification 13.1 should escape preemption because it was necessary to efficient completion of the clean-up. The Trades Council, joined by the MWRA and various amici in their briefs on rehearing, maintain that because the Specification was enacted to further proprietary, rather than regulatory, interests, it falls within an exception to the preemption doctrine allegedly articulated by the Supreme Court in *Wisconsin Dep't of Indus.* v. *Gould*, 475 U.S. 272 (1986). We determined that this issue merited closer scrutiny by the court as a whole, and issued an order requesting the parties to address the following isuses:

> Is the MWRA's insistence upon the labor conditions at issue reasonably related to an important proprietary interest of the state, a legitimate response to state procurement restraints, or a legitimate response to local economic needs?
>
> If so, is that insistence therefore lawful, *Wisconsin Dep't of Industry* v. *Gould*, 475 U.S. 282, 291 (1986)

and *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608 (1986), being distinguishable in this respect?

III. STANDARD OF REVIEW

On review, we will reverse the district court's denial of a preliminary injunction where the denial is an abuse of discretion, or is based upon a clear error of law, or where the district court's findings of fact are clearly erroneous. *See, e.g., Massachusetts Ass'n of Older Americans* v. *Sharp*, 700 F.2d 749, 751-52 (1st Cir. 1983); *Maceira* v. *Pagán*, 649 F.2d 8, 15 (1st Cir. 1981); *see also General Electric Co.* v. *New York State Dept. of Labor*, 891 F.2d 25, 26 (2d Cir. 1989) (reversing denial of preliminary injunction on ERISA preemption grounds); 7 Moore, *Federal Practice and Procedure* ¶ 65.04[2] (2d ed. 1987). Where, as here, appellants are asking for a mandatory injunction which will change the *status quo ante* during the pendency of litigation, we will take into account the exigencies and circumstances of the situation. *See Massachusetts Coalition of Citizens with Disabilities* v. *Civil Defense Agency*, 649 F.2d 71, 76 n.7 (1st Cir. 1981).

To be entitled to injunctive relief a party must establish that it has a likelihood of success on the merits, that it will suffer immediate and irreparable harm if relief is not granted, that such harm outweighs any harm to the non-moving party, and that the public interest will not be adversely affected. *Planned Parenthood* v. *Bellotti*, 641 F.2d 1006, 1009 (1st Cir. 1981); *Lancer* v. *Lebanon Housing Authority*, 760 F.2d 361, 362 (1st Cir. 1985). The balancing of interests shifts in plaintiffs' favor when a strong likelihood of success on the merits is shown. *SEC* v. *World Radio Mission, Inc.*, 544 F.2d 535, 541-42 (1st Cir. 1976).

IV. DISCUSSION

In our opinion, appellants have made a strong showing that they are likely to succeed on the merits. In so holding, we do not reach their entire array of arguments, because in our view, their main argument ultimately carries the day.

A. *Preemption under the NLRA*

In order to analyze preemption under the NLRA, we must first examine a bit of the Act's evolution. Since first enacted in 1935, the NLRA "has empowered the National Labor Relations Board 'to prevent any person from engaging in any unfair labor practice . . . [defined by the Act] affecting commerce.'" 29 U.S.C. § 160(a). "By this language, and by the definition of 'affecting commerce' . . . Congress meant to reach to the full extent of its power under the Commerce Clause." *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1, 3 (1957). *See also* 29 U.S.C. § 152(7).[7] Thus, in the area of labor relations there is "not only a general intent to pre-empt the field but also . . . [the] inescapable implication of exclusiveness." *Guss*, 353 U.S. at 10. In *Guss* the Supreme Court went so far as to carry that principle to the point of creating a no-man's land, in which no jurisdiction existed on behalf of state authorities to intervene in labor relations matters covered by the Act notwithstanding the Board's refusal to exercise dominion over such disputes. It should be noted that, although *Guss* involved unfair labor practices, the Act uses substantially similar language regarding the representation procedures estab-

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[7] 29 U.S.C. § 152(7):

> The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

See also NLRB v. *Bradford Dyeing Ass'n*, 310 U.S. 318, 325-26 (1940) (construing "affecting commerce").

lished thereunder, and therefore the principle established by *Guss* is of equal application to representation matters.[8]

The situation created by *Guss* led in 1959 to the amendment by Congress of Section 14 of the Act, allowing for state intervention in labor disputes affecting commerce in which the Board has specifically declined to exercise jurisdiction.[9] Prior to that amendment, as is discussed in *Guss*, 353 U.S. at 6-7, a state could only intervene in a labor dispute affecting commerce if the Board had entered into a cession agreement pursuant to Section 10(a) of the Act,[10] and then only if the state statute was consistent with a corresponding provision in the Act.

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[8] *See* 29 U.S.C. §§ 141(b), 151, 152, 157, 159. For example, § 159(c)(1) provides that:

> Whenever a petition shall have been filed . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation *affecting commerce* exists shall provide for an appropriate hearing upon due notice . . . (emphasis supplied).

[9] 29 U.S.C. § 164:

> (c)(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to subchapter II of chapter 5 of Title 5, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction under the standards prevailing upon August 1, 1959.
>
> (2) Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

[10] 29 U.S.C. § 160(a):

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall

Intervention in labor matters affecting commerce today is thus limited to cession agreements by the Board with the states under Section 10(a) of the Act, or specific declinations by the Board to intervene pursuant to Section 14(c) of the Act. There is a third category, also under Section 14 of the Act,[11] which allows the states to legislate to prohibit union shop agreements.

It is a textbook proposition that, under the supremacy clause of Article VI of the Constitution,[12] the "supreme" congressional law supersedes or preempts state law. Preemption occurs not only when there is an outright conflict between the federal scheme and the state requirement, but also when congressional action is an implicit barrier—*e.g.*, when state regulation interferes unduly

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not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

[11] 29 U.S.C. § 164(b):

Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

[12] U.S. Const. art. VI, para. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

with the accomplishment of congressional objectives. Congressional legislation in an area in which a state seeks to regulate does not necessarily preclude all state action. Nor does the fact that there is no explicit federal-state conflict or congressional statement of intent to bar state authority inescapably rule out a finding of preemption. *Cf. Guss*, 353 U.S. at 10.

> The question in each case is what the purpose of Congress was [in legislating] . . . Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. Or the state policy may produce a result inconsistent with the objective of the federal statute. It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide.

Rice v. *Santa Fé Elevator Corp.*, 331 U.S. 218, 230-31 (1947) (citations omitted).[13]

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[13] The dissent's definition of preemption, *see* slip op. at 39 (Breyer, C.J., dissenting), although correct as far as it goes, is unduly restrictive. Omitted is any mention of preemption "where the pervasiveness of the federal regulation precludes supplementation by the States, [or] where the federal interest in the field is sufficiently dominant." *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 300 (1988); *French* v. *Pan Am Express, Inc.*, 869 F.2d 1, 2 (1st Cir. 1989).

The Supreme Court has recognized two types of federal preemption of state and local government action in the field of labor law. First, the Supreme Court has prohibited the states from regulating activities "which are protected by Section 7 of the National Labor Relations Act, or constitute an unfair labor practice under Section 8." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 244 (1959). Second, the Court has held that state and local governments are prohibited from regulating activities which Congress intended to be left unrestricted by any governmental power. *Lodge 76, Int'l Assoc. of Machinists & Aerospace Workers* v. *Wisconsin Emp. Comm.*, 427 U.S. 132, 140 (1976).[14]

While both forms of preemption are implicated by this appeal, we believe that the present case is most heavily influenced by the Supreme Court's holdings in the *Golden State Transit Corp.* cases, which relied and expanded upon the *Machinists* doctrine. *See Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608 (1986) [*Golden State I*]; *Golden State Transit Corp.* v. *City of Los Angeles*, 110 S. Ct. 444 (1989) [*Golden State II*]. While there are differences between the *Golden State* cases and the present case, we think the similarities have greater salience.

In *Golden State I* the employer sought renewal of a taxicab operating license from the City of Los Angeles. At the time the employer was engaged in a labor dispute with the union that represented its employees. The City Council conditioned renewal of the franchise on settlement of the labor dispute by a specific date. When the strike was not settled by that date, the franchise expired. The Supreme Court ruled that the city's action in conditioning renewal of the franchise on settlement of the

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[14] In *Machinists*, the Court had found unlawful a state commission's prohibition against union refusals to work overtime during collective bargaining negotiations. 427 U.S. at 148-49.

labor dispute was preempted by the Act. The Court stated, in language which we believe is adaptable to the present controversy:

> Although the labor-management relationship is structured by the NLRA, certain areas intentionally have been left " 'to be controlled by the free play of economic forces.' " . . . States are therefore prohibited from imposing additional restrictions on economic weapons of self-help, . . . unless such restrictions presumably were contemplated by Congress. . . . "[T]he crucial inquiry regarding pre-emption is the same: whether, 'the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes.' "

Golden State I, 475 U.S. at 614-15 (citations omitted). The city's insistence on a settlement was preempted by the Act because it " 'entered into the substantive aspects of the bargaining process to an extent Congress has not countenanced.' " *Id.* at 615-16 (citations omitted). This was so because "[t]he NLRA requires an employer and a union to bargain in good faith, but it does not require them to reach agreement." *Id.* at 616.

In *Golden State II*, where the issue involved the availability of compensatory damages, the Supreme Court reiterated with even greater firmness the NLRA's subordination of state interests to the principle of unfettered collective bargaining. The Court declared that the *Machinists* rule—shielding the collective bargaining process from government interference—was not designed "to answer the question whether federal or state regulations should apply to certain conduct. Rather, it is more akin to a rule that denies *either* sovereign the authority to abridge a personal liberty." *Golden State II*, 110 S. Ct. at 451-52 (emphasis added). The Court concluded that the *Machinists* preemption rule "is a guarantee of free-

dom for private conduct that the state may not abridge." *Id.* at 452.

In the present case, the state's intrusion into the bargaining process is pervasive. The state not only mandates that a labor agreement be reached before a bid is awarded, but dictates with whom that agreement is going to be entered, and specifies what its contents shall be. For all intents and purposes the state here *eliminates* the bargaining process altogther. Inasmuch as regulation of this conduct [15] seems central to federal labor relations, we do not see how it could be considered peripheral under the *Garmon* analysis. *Garmon*, 359 U.S. at 243. *Compare Belknap, Inc.* v. *Hale*, 463 U.S. 491, 509 (1983) (third parties hired as strike replacements had state-law causes of action based on misrepresentations by the employer); *Automobile Workers* v. *Russell*, 356 U.S. 634, 635 (1958) (state court jurisdiction over common law tort action against union for mass picketing upheld); *Youngdahl* v. *Rainfair*, 355 U.S. 131, 132 (1957) (same re injunctive power to prevent interference with free use of streets); *Automobile Workers* v. *Wisconsin Emp. Rel. Board*, 351 U.S. 266, 274 (1956) (same re power to enjoin violent union conduct); *United Constr. Workers* v. *Laburnum Constr. Corp.*, 347 U.S. 656, 657 (1954) (state may exercise its historic powers over such traditionally local matters as public safety and order and the use of streets and highways); *Allen-Bradley Local* v. *Wisconsin Emp. Rel. Board*, 315 U.S. 740, 749 (1942) (same).

To be sure, there may be instances where the "regulated conduct touch[es] interests so deeply rooted in local

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[15] The fact that the state here has acted through its bidding regulations rather than its general law is irrelevant to our analysis, as "judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." *Golden State I*, 475 U.S. at 614 n.5 (quoting *Garmon*, 359 U.S. at 243).

feeling and responsibility that, in the absence of compelling congressional direction, [a court] could not infer that Congress had deprived the States of the power to act." *Garmon*, 359 U.S. at 244. The district judge, in a commendable attempt to harmonize the irreconcilable conflicts presented by this difficult case, reasoned that even if the Master Labor Agreement "were to have some impact on NLRA-regulated conduct, that impact must be considered in the light of important state interest, namely the scheduled and court-ordered completion of the harbor clean-up expeditiously and without unnecessary expense." In effect, the court held that this public purpose sanitized its constitutional shortfalls. While we do not totally fault the court's efforts in this respect, nor disagree as to the importance of the Boston Harbor clean-up, it cannot be said that congressional concern for a uniform, national labor policy as embodied in the NLRA, is entitled to secondary deference. Importantly, the regulated conduct here is the labor relations/bargaining process itself. Such processes have been termed by Congress as paramount to national, not local, interests. We, ourselves, have recognized as much. *See General Electric Co.* v. *Callahan*, 294 F.2d 60, 67 (1st Cir. 1961) (holding that a state labor board's interference with a labor contract negotiation "conflict[ed] with the national policy of free and unfettered collective bargaining"), *cert. dismissed*, 369 U.S. 832 (1962). Moreover, in at least one respect, Specification 13.1 seems not to further, but rather to trample, what the Massachusetts legislature has determined to be the Commonwealth's interest. Massachusetts has enacted a Fair Competitive Bid Law which requires that the Commonwealth obtain through open competition the lowest responsible and eligible bid for public construction projects. Mass. Gen. Laws ch. 30, § 39M, and ch. 149, § 44A-L. Although we do not reach the state law arguments raised by ABC, we do note that this apparent conflict undercuts the MWRA's position that Specification 13.1 furthers peculiarly local interests.

There are few areas in which local interest can be more legitimately exercised than in protecting the public from financial hardship caused by fiscally irresponsible persons using the state highways. Yet the Supreme Court invalidated a state statute whose purpose was resolution of such a dilemma because it concluded that it conflicted with the Federal Bankruptcy Act. *Pérez* v. *Campbell*, 402 U.S. 637, 656 (1971). The Court rejected the argument that the purpose of the state law, rather than its effect on the operation of federal legislation, should govern its validity. Even if the state claimed to be concerned with promotion of highway safety, such a statute could not stand if it conflicted with the federal scheme: "[S]uch a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law." *Id.* at 652.

Although the local concerns that led to the promulgation of Specification 13.1—"labor harmony during [the] life . . . [of] . . . this critical project"—are laudable, they conflict with paramount federal law and must therefore fall. We should add that we are in any event somewhat skeptical of the *pax industrial* which the Master Labor Agreement utopically promotes. This peaceable kingdom may be somewhat less than attainable considering that this contract is no bar to rival, or for that matter, anti-union, activity. *See* 29 U.S.C. § 158(f), *last proviso.*

Appellees contend that, had the Master Agreement been entered into directly between the state agency and the unions, it would be unassailable, because "[t]he National Labor Relations Act leaves regulation of the labor relations of state and local government to the States." *Abood* v. *Detroit Bd. of Education*, 431 U.S. 209, 223 (1977). Of course, if the MWRA were the actual employer of the

Project laborers, the NLRA would be totally inapplicable as States are excluded from the definition of "employer." 29 U.S.C. § 152(2).[16] The state's substantial participation in the Project, however, is not enough to alter its status from regulator to employer, nor does any party seriously claim such a relationship. There are insufficient indicia of an employer/employee relationship between the MWRA and the laborers.[17] Rather, the state is in its common role of a third party purchaser. If the state employer exclusion from the NLRA were interpreted to include all situations in which a state contracted for goods or services, the exception would likely swallow the rule.[18]

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[16] 29 U.S.C. § 152(2) states in part:

> The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof . . .

[17] The distinction between an employee and an independent contractor under the NLRA is to be determined by application of common law agency principles. *NLRB* v. *Amber Delivery Service, Inc.*, 651 F.2d 57, 60 (1st Cir. 1981). Under this standard, the relationship between the construction workers and the MWRA is a contracting, not an employment, relationship. For example, the MWRA does not have the right to control the laborers' performance, nor does it pay their salaries, provide pension or other benefits, or make FICA payments on their behalf.

[18] Nevertheless, there may be situations in which a contractual relationship between the state and a private entity is such that the state would be considered an employer for the purposes of the NLRA. *See, e.g., Board of Trustees of Memorial Hosp.* v. *NLRB*, 624 F.2d 177 (10th Cir. 1980) (holding that where a private employer who has contracted to provide services to an exempt political subdivision does not retain sufficient control over the employment relationship to engage in collective bargaining, the exempt subdivision is deemed the true employer); *Compton* v. *National Maritime U. of America*, 533 F.2d 1270 (1st Cir. 1976) (noting that a private contractor that performs services for an exempt governmental agency may be deemed to share the exemption).

Allowing a state to impose restrictions upon *all* companies from which it purchases goods or services would effectively permit it to regulate labor relations between private employers and their employees thus totally displacing the NLRA, not just in this Project, but also statewide, and, if the practice were to become generalized, nationally. Indeed, an anti-union state government could allow only non-union employers to bid on state projects, if the state-as-employer argument is taken to its extreme.

As discussed herein, a state is not included in the definition of employer. Normally, employers cannot enter into pre-hire agreements. Congress created an exception to this prohibition for *employers* in the construction industry, as such term is defined in the Act. To suggest, as is done by the dissent, *see* slip op. at 51-52 (Breyer, C.J., dissenting), that a *state*, by definition not an employer within this statute, somehow reverts to the status of statutory employer for purposes of this exception is fancy judicial footwork at its nimblest. The facts provide a dose of reality that not only undercuts the dissent's imaginative analysis of the legislative history of the construction industry exceptions, but also destroys its premise that the state should be treated as a private employer. Indisputably, the MWRA is not an employer under either the law, 29 U.S.C. § 152(2), or the facts of this case.

Thus, absent some principled basis for reading an exception into the legal framework, a matter which we discuss *post*, we believe that either because of its regulation of matters protected by § 7 of the Act (*e.g.*, the mandatory recognition of the Trades Council), *Garmon*, 359 U.S. at 245, or because of its direct intrusion into the collective bargaining process, *Golden State I*, 475 U.S. at 614-15, Specification 13.1 frustrates the purposes of the Act and is, therefore, preempted.

B. *Sections 8(e) and (f) of the Act—The construction industry exemption*

Appellees argue, and the district court in effect ruled, that the provision of Sections 8(e) and (f) of the Act validate the Master Labor Agreement "in the context of the unique conditions which exist in the construction industry."

Section 8(e) of the Act [19] makes it an unfair labor practice for an employer and a union to enter into what is commonly referred to as a "hot cargo" agreement. Under a "hot cargo" agreement, generally, the employer binds itself not to do business with another employer or person. This type of agreement developed out of situations in which unions did not want their members to be working or handling "struck" goods. Section 8(e), however, contains a limited exemption for the construction industry, "relating to the contracting or subcontracting of work to be done at the site of the construction." Thus "hot cargo" agreements are legal, to this circumscribed extent, in the construction industry.

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[19] 29 U.S.C. § 158(e) states in part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: . . .

Section 8(f) of the Act [20] creates another exception for the building and construction industry by allowing certain actions, which would otherwise be prohibited as unfair labor practices, by employers and unions in that line of work. Thus a construction industry employer may enter into a so-called "pre-hire" agreement with a union, *e.g.*, a collective bargaining agreement wherein the union's representative status is immaterial and which in fact is usually entered into prior to the hiring of any employees. Furthermore, such an agreement may contain a union shop provision requiring membership in the union seven days after hiring, 29 U.S.C. § 158(f)(2),

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[20] 29 U.S.C. § 158(f):

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

which would otherwise be illegal;[21] a requirement that the employer notify the union of job openings giving the labor organization an opportunity to refer qualified job workers, 29 U.S.C. § 158(f)(3); as well as a condition establishing minimum training or experience qualifications and area-wide seniority. 29 U.S.C. § 158(f)(4).

A construction industry labor contract entered into under the exceptional provisions of Section 8(f) is not, as specifically stated in the final proviso of that section, a bar to a petition for election, be it by a rival union,[22] by the employer[23] or by the employees themselves.[24] If the employees elect a rival union as their bargaining agent, neither the winning union nor the employer are required to assume the 8(f) contract. If the employees reject the 8(f) contracting union as their bargaining agent and do not choose another bargaining agent, the contract is totally void because one of the contracting parties is disqualified.

It is apparent from the above that under the exceptions established by Sections 8(e) and (f) of the Act, the Master Labor Agreement between the Trades Council and Kaiser is a valid labor contract. *See Jim McNeff, Inc.* v. *Todd*, 461 U.S. 260, 265-66 (1983). That conclusion, however, is irrelevant to the preemption issue at hand. Appellants do not challenge the validity of that agreement; they contest the legality of Specification 13.1, which establishes recognition of the Trades Council and signing of the Master Labor Agreement as a condition of the award of an MWRA bid. On said issue, Sections 8(e) and (f) have no bearing, except as reinforcement for appellants' preemption arguments. It is clear, both from

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[21] The usual provision is 30 days. *See* 29 U.S.C. § 158(a)(3).

[22] 29 U.S.C. § 159(c)(1)(A).

[23] 29 U.S.C. § 159(c)(1)(B).

[24] 29 U.S.C. § 159(e)(1).

their nature and history, that Congress extensively debated and considered these controversial provisions before their enactment. *See generally*, 1959 U.S. Code Cong. & Admin. News, p. 2318 *et seq.* It is unlikely that Congress intended to leave open to Balkanization by the states such core areas as unfair labor practices and collective bargaining, which are the matters inescapably arising from Sections 8(e) and (f) problems. Indeed, nowhere in the legislative history is there any indication that a state would be allowed to impose this type of regulation. The history of Sections 8(e) and (f) discusses private employers only; the silence as to permitted state regulation is deafening. In enacting these exceptional provisions, Congress occupied the field to the exclusion of such local regulations as are exemplified by Specification 13.1. *See Guss*, 353 U.S. at 10. Although the Master Labor Agreement is a valid contract pursuant to Sections 8(e) and (f) of the Act, Specification 13.1 unduly interferes with the area of labor negotiations which Congress clearly intended to leave unregulated under the same statute: the collective bargaining process. *See Golden State I*, 475 U.S. at 614-16.

C. *Proprietary or regulatory interest*

In *Wisconsin Dept. of Indus. v. Gould*, 475 U.S. 282 (1986), the Court struck down a state statute barring repeat violators of the NLRA from bidding on state contracts as preempted under the *Garmon* doctrine. *Gould*, 475 U.S. at 291. The state argued that it should not be restricted by the Commerce Clause when it acts as a market participant. The Court rejected this argument, noting first, that the state was functioning more as a regulator than as a market participant, and second, that the exception to the Commerce Clause might be broader than state action allowed under the NLRA. *Id.* at 289-90. The Court based its analysis on the differing purposes served by the Commerce Clause and the NLRA: whereas

the Commerce Clause contains " 'no indication of a constitutional plan to limit the ability of the States themselves to operate in the free market,' . . . [t]he NLRA, in contrast, was designed in large part to 'entrust administration of the labor policy for the Nation to a centralized administrative agency.' " *Id.* (citations omitted).

In concluding the *Gould* opinion, the Court explored, but did not define, the boundaries of its holding:

> We do not say that state purchasing decisions may never be influenced by labor considerations, any more than the NLRA prevents state regulatory power from ever touching on matters of industrial relations. Doubtless some state spending policies, like some exercises of the police power, address conduct that is of such "peripheral concern" to the NLRA, or that implicates "interests so deeply rooted in local feeling and responsibility," that pre-emption should not be inferred. *Garmon*, 359 U.S. at 243-44; *see also, e.g., Belknap, Inc.* v. *Hale*, 463 U.S. 491, 498 (1983). And some spending determinations that bear on labor relations were intentionally left to the States by Congress. *See New York Tel. Co.* v. *New York State Labor Dept.*, 440 U.S. 519 (1979).

Gould, 475 U.S. at 291. Having opened this door, however, the Court firmly closed it on the Wisconsin rule at issue, stating that "[w]e are not faced here with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs, or with a law that pursues a task Congress intended to leave to the States." *Id.*

Appellees submit that this language creates an exception to the preemption doctrine arising out of the distinction between a state's interest as proprietor versus its interest as regulator. Where a spending decision such as Specification 13.1 is animated by the exigency of doing

business rather than the regulation of labor relations; where the measure's effect on labor relations is incidental to a legitimate and necessary proprietary purpose; that measure, argue appellees, is saved from preemption by the supposed *Gould* exception. As a subsidiary proposition, appellees also contend that the MWRA's action would be lawful under Sections 8(e) and (f) were it undertaken by a private employer, and that there is no basis under the NLRA to treat a state more harshly than a comparably situated private party.

We can dispose of the latter contention quite briefly before moving to the more troublesome principal point. First, Congress is perfectly capable of distinguishing between states and private parties when it chooses, and it has so chosen here. Sections 8(e) and (f) refer to "employers." The Act states that the term "employer" "shall not include . . . any State or political subdivision thereof." 29 U.S.C. § 152(2). Thus it is clear that the MWRA is not encompassed by Sections 8(e) and (f), and its conduct cannot be compared with what might be acceptable conduct by a private employer.[25]

Moreover, the Court itself has underscored the state/private distinction, in the very case appellees use to support their proprietary interest argument. The *Gould* opinion states:

> [G]overnment occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints. Outside the area of Commerce Clause jurisprudence, it is far

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[25] There are, of course, federal statutes other than the NLRA which treat the actions of states and private parties differently. *See, e.g.*, the Sherman Antitrust Act, 15 U.S.C. §§ 1, 7 (prohibiting certain private conduct but exempting the states); the Securities Act, 15 U.S.C. § 77(c) (exempting government securities from the Act's provisions); the Civil Rights Act, 42 U.S.C. § 1983 (prohibiting certain state conduct only).

> from unusual for federal law to prohibit States from making spending decisions in ways that are permissible for private parties. The NLRA, moreover, has long been understood to protect a range of conduct against state but not private inteference. The Act treats state action differently from private action not merely because they frequently take different forms, but also because in our system States simply are different from private parties and have a different role to play.

Gould, 475 U.S. at 290. Thus it is plain that the private employer comparison merits little weight. The MWRA is an arm of the state, and its actions must be judged accordingly.[26]

Moving to the issue of proprietary interest, we find that we are ultimately unpersuaded that such an exception, if it exists at all, applies in this case. Other than the dicta in *Gould*, the Supreme Court has never articulated —much less applied—a proprietary interest exception. Moreover, the cases cited in *Gould* do not support an exception for the situation at hand. *Belknap* v. *Hale*, 463 U.S. at 509, is one of a line of cases permitting state tort law remedies to coexist with the NLRA. *See supra* at pp. 20-21. These cases merely indicate application of the *Garmon* analysis allowing state action in "peripheral" areas. *Garmon*, 359 U.S. at 243. For an example of a "spending determination" addressing "state procurement constraints" or "local economic need," *Gould*, 475 U.S. at 291, the Court cited *New York Tel. Co.* v. *New York State Labor Dept.*, 440 U.S. 519 (1979). In that case, the Court found no preemption where the state sought to impose a mandatory minimum benefit (unemployment compensation) through a law of general ap-

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[26] The dissent appears to suggest that basing a distinction on whether or not an actor is an arm of the state is overly technical. *See* slip op. at 51 (Breyer, C.J., dissenting). We disagree, and point again to the statutes cited *supra* n.25, as well as the entire Bill of Rights.

plicability. *Id.* at 545-46.[27] *See also Fort Halifax* v. *Coyne*, 482 U.S. 1, 22 (1987) (upholding Maine statute requiring employers to provide severance pay); *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 755 (1985) (upholding state statute requiring certain minimum health benefits to be included in employee health plans). As this court has noted, because such a statute "'neither encourages nor discourages the collective bargaining processes that are the subject of the NLRA,' it is 'a valid and unexceptional exercise of the State's police power.'" *Beckwith* v. *United Parcel Service, Inc.*, 889 F.2d 344, 349 (1st Cir. 1989) (quoting *Metropolitan Life Ins.*, 471 U.S. at 755, 758). Plainly, the same cannot be said of Specification 13.1, which mandates adherence to a particular contract with a particular group of labor unions, in lieu of the collective bargaining process.

Our reading of the *Gould* "exception" is that it largely restates the *Garmon* proposition: Some state interference into the collective bargaining process is permitted if it, first, is "peripheral" to federal labor policy, or, second, pertains to matters "deeply rooted in local feeling and responsibility." *Garmon*, 359 U.S. at 243-44. As we

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[27] In *New York Tel.*, a plurality of the Court held that New York's unemployment benefits statute was not preempted despite the fact that it directly affected the economic balance between striking workers and struck employers. Justice Stevens, joined by two others, argued that because the unemployment statute was a benefits program of general applicability rather than a law directly targeting private conduct in the labor-management realm, it was more difficult to infer congressional intent to preempt it. *See New York Tel.*, 440 U.S. at 533 (plurality opinion). Five Justices disagreed that this distinction impacted the preemption inquiry. *See id.* at 549-50 (Blackmun, J., concurring), 57-58 (Powell, J., dissenting). Justices Blackmun and Powell argued that when a law directly affects labor-management relations, whether the statute is of general applicability or is particularly directed at regulating labor-management relations is of little moment. By analogy, then, when a regulation such as Specification 13.1 directly affects labor-management relations, whether the regulation's purpose is proprietry or regulatory should be relatively insignificant.

have stated *ante*, at p. 20, Specification 13.1 is a direct regulation of the collective bargaining process. Thus it can neither be termed "peripheral" nor "local." To be sure, the Boston Harbor clean-up is a matter of great local interest. It is not the clean-up, however, which is being regulated; collective bargaining is being regulated, and that cannot be.

At any rate, *Garmon* is only one avenue of preemption under federal labor law—albeit one which most likely applies to Specification 13.1. This opinion, however, has rested largely on the *Machinists* doctrine as articulated in *Golden State I*. It is noteworthy that in *Golden State I*, once the Court had determined that the City of Los Angeles had directly interfered with the collective bargaining process, it expressly declined to consider the nature and extent of the City's interest in resolving the labor dispute. *Golden State I*, 475 U.S. at 617-18 and n.8.[28] Yet the City would seem to have a strong and legitimate interest in ensuring the adequacy of its transportation system, *see id.* at 620 (Rehnquist, J., dissenting)—at least tantamount to the MWRA's interest in ensuring speedy completion of the harbor clean-up. We can only conclude that the lesson of the *Golden State* cases is that, where interference into the collective bargaining process by the state is *direct*, an asserted state interest of the type at issue here, whether "proprietary" or otherwise, cannot justify the interference.

D. *Other Allegations*

In view of our ruling on the issue of preemption of Specification 13.1 by the Act, it is unnecessary for us to reach the other questions raised by the appeal. *See Lane* v. *First National Bank of Boston*, 871 F.2d 166, 168 (1st Cir. 1989).

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[28] The Court also did not reach the question of whether the *Garmon* "peripheral" exception even applies to a *Machinists* case. *Id.* at 618 n.8.

V. CONCLUSION

Specification 13.1 unduly restricts aspects of the labor-management relationship intentionally left unregulated by Congress and is thus preempted by the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.* The decision of the district court is reversed. The district court, at the direction of this court in its original panel opinion in this case, has already issued a preliminary injunction against enforcement of Specification 13.1. That injunction remained in force during the pendency of the rehearing *en banc.* Therefore, we simply order that the preliminary injunction continue in effect during the further proceedings in this case.

Reversed and remanded. Costs to appellants.

BREYER, *Chief Judge*, with whom CAMPBELL, *Circuit Judge* joins (dissenting). The Commonwealth of Massachusetts, acting through the Massachusetts Water Resources Authority, will let contracts for more than $6 billion of construction work on the Boston Harbor Clean-Up Project. The MWRA requires, as a condition for a contract award, that the winning bidder abide by (and insist that its subcontractors abide by) a prehire bargaining agreement. That agreement requires the contractors and subcontractors to recognize the Building Trades Council as bargaining representative for all craft employees, to hire workers through the hiring halls of the Council's constituent unions, to require hired workers to join the relevant union within seven days, to follow specified dispute-resolution procedures, to apply the Council's wage, benefit, seniority, apprenticeship and other rules, and to make contributions to the Council unions' benefit funds. In return for the MWRA's promise to insist that contractors sign the agreement, the Council has promised the MWRA labor peace throughout the 10-year life of the construction project.

Were the industry here involved other than the construction industry, we could understand how the majority would consider this agreement a rather intrusive effort by a state agency to control the labor relations of subcontractors with their employees. The construction industry, for labor-relations purposes, however, is special. As all parties concede, the special construction-industry provisions in §§ 8(e) & (f) of the National Labor Relations Act, 29 U.S.C. §§ 158(e) & (f), would permit the MWRA, were it a *private* party letting construction contracts, to act just as it wishes to act here. Indeed, general contractors in the construction industry often enter into prehire agreements of this sort. The only question in this case is whether the NLRA forbids the MWRA, because it is a state agency, to do what the Act explicitly permits a private contractor to do.

The NLRA does not contain any language that *explicitly* forbids a state, acting like a general construction contractor, from entering into a prehire agreement. Rather, the majority believes that the Act *implicitly* forbids it from doing so, *i.e.*, that the Act implicitly removed, or preempted, a state's power to act as the MWRA has acted here. Applying general principles of pre-emption, the majority must therefore believe (1) that the MWRA's action "conflicts with" the Act, (2) that it "frustrate[s] the federal [statutory] scheme," or (3) that it appears "from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the states." *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978) (setting forth general conditions for pre-emption); *see also Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 300 (1988). We do not see how permitting a state agency, when acting like a general contractor, to make labor agreements just like those that private general contractors make, could "conflict with" the NLRA, "frustrate" the NLRA "scheme," or otherwise interfere with the regulatory system that the NLRA creates. We therefore dissent.

The Supreme Court has described two related sets of concerns that led Congress, implicitly, to forbid certain kinds of state activities. First, Congress intended to grant the National Labor Relations Board *exclusive* authority to determine whether § 8 of the Act prohibits or § 7 of the Act protects certain particular labor-related activities and to provide remedies for violations. Thus, (with a few narrow exceptions) a state may not regulate activities that the Act arguably prohibits or protects. *See San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 244-45 (1959). Nor may it add to, or subtract from, the remedies that the federal scheme provides. *See Garner* v. *Teamsters Local Union No. 776*, 346 U.S. 485, 498-99 (1953).

Second, Congress intended to "leave some activities unregulated and to be controlled by the free play of economic forces." *Lodge 76, Int'l Ass'n of Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 144 (1976). Thus, states may not regulate "economic warfare between labor and management," *New York Tel. Co.* v. *New York State Labor Dep't*, 440 U.S. 519, 530 (1979), when doing so significantly interferes with the "intentional balance" that Congress contemplated "between the uncontrolled power of management and labor to further their respective interests." *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608, 614 (1986). They may not, for example, award damages for peaceful secondary picketing, *see Local 20, Teamsters Union* v. *Morton*, 377 U.S. 252, 258 (1964), or forbid a union's concerted refusal to work overtime, *see Machinists*, 427 U.S. at 149, for, in both instances, Congress intended "to preserve" those "means of economic warfare for use during the bargaining process." *New York Tel.*, 440 U.S. at 530.

The majority finds this second kind of pre-emption present here. It concludes that the MWRA has regulated the relationship between labor and management in a way that upsets the "balance" between labor and management that Congress intended. In our view, however, the special construction-industry exceptions in the Act itself show that Congress did not intend pre-emption. Insofar as the MWRA's purchasing decision affects labor-management relations, it does so only to the extent that Congress foresaw and (with respect to general contractors) explicitly authorized. Moreover, the relevant Supreme Court cases in this area reinforce our view that the MWRA's actions do not "conflict with" or otherwise "frustrate" the NLRA or its objectives.

1. *The Act's Construction-Industry Exceptions.* The construction-industry exceptions of the NLRA make clear that the conditions that the MWRA wishes to impose do

not represent an effort by the state to tilt the economic playing field, that is to say, to interfere with the "free play of economic forces" between subcontractors and their employees, in a manner that Congress did not intend to permit. Rather, Congress defined the playing field in the construction industry (but not elsewhere) in a special way: it permitted a general contractor to insist that subcontractors enter into prehire agreements of the very sort here at issue. Thus, when the MWRA, acting in the role of purchaser of construction services, acts just like a private contractor would act, and conditions its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find, it does not "regulate" the workings of the market forces that Congress expected to find; it exemplifies them.

To understand how this is so, consider how the construction-industry exceptions work within the context of the Act. The Act, in §§ 8(a), (b) and (e), 29 U.S.C. §§ 158(a), (b) & (e), lists a set of "unfair labor practices." For example, it says in §§ 8(a)(1) and 7 that employers may not interfere with their employees' efforts to organize collectively or discriminate against union members, *id.* §§ 158(a)(1) & 157; it says in § 8(b)(4) that labor organizations may not engage in secondary boycotts, *id.* § 158(b)(4); and, it requires in §§ 8(a)(5) and 8(b)(3) that both employers and labor organizations bargain collectively, *id.* §§ 158(a)(5) & 158(b)(3). Then, in § 8(f), the Act creates a specific construction-industry exception. That exception says:

> (f) It shall not be an unfair labor practice under subsections (a) and (b) . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment will be engaged) in the building and construction industry with a labor organization [in the construction industry] . . . because (1) the majority status of such labor organiza-

> tion has not been established . . . , or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment . . . , or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for [seniority] requirements . . . .

Id. § 158(f). Without this exception a construction-industry prehire agreement might constitute an unfair labor practice, for such an agreement (naming the unions to which all employees of all contractors and subcontractors must belong) might be seen as interfering with employees' rights to bargain through representatives of their own choosing, in violation of §§ 8(a)(1) and 7, *see id.* §§ 158(a)(1) & 157, or unreasonably discriminating against those who are not union members, in violation of § 8(a)(3). *See id.* § 158(a)(3).

Section 8(e) supplements the list of unfair labor practices contained in §§ 8(a) and (b) of the Act. It says that it is an unfair labor practice for a labor organization and an employer to enter into what is known, colloquially, as a hot-cargo agreement, whereby a secondary employer agrees to help a union (engaged in a dispute with a different, primary, employer) by refusing to do business with that other, primary, employer. *See id.* § 158(e). However, a special construction-industry exception, attached to section (e), says:

> [N]othing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contract-

> ing or subcontracting of work to be done at the site of the construction . . . .

Id. Without this second exception, a construction-industry prehire agreement might violate the hot-cargo prohibition, for it requires a signing contractor to "cease doing business" with a subcontractor unless the subcontractor enters into a similar hiring agreement with the union.

The background of these subsections makes clear why Congress chose to create an exception for the construction industry, and those reasons have nothing at all to do with the private or public nature of the general contractor. Labor and management in the construction industry engaged in prehire bargaining long before Congress passed the NLRA. *See To Amend the National Labor Relations Act, 1947, with Respect to the Building and Construction Industry: Hearings on S. 1973 Before the Subcomm. on Labor and Labor-Management Relations of the Senate Comm. on Labor and Public Welfare*, 82d Cong., 1st Sess. 42 (1951) [hereinafter *Hearings*] (testimony of William E. Maloney, Vice Pres., Building and Construction Trades Dep't, Pres., Operating Engineers, A.F. of L.). The language of the 1935 Wagner Act seemed to outlaw prehire agreements, because, for example, the unions with whom employers would negotiate these agreements typically did not meet the Act's representational requirements. Nonetheless, the prehire bargaining practice continued. The NLRB initially refused to extend its jurisdiction to the construction industry. It said that activity in the construction industry did not "affect commerce." *See* S. Rep. No. 1509, 82d Cong., 2d Sess. 4 (1952) (citing *In re Brown & Root, Inc.*, 51 N.L.R.B. 820 (1943)).

By the late 1940s, however, federal courts had held that the Board must exercise jurisdiction over this industry. *See* S. Rep. No. 1509, *supra*, at 4. And, the Board eventually concluded that the Taft-Hartley Act of 1947 required it to do so. Consequently, the Board began to invalidate union-security clauses in prehire agreements,

and it began to require union-certification elections. This effort to force elections proved unsuccessful. *Id.* at 5. The Board then announced that it would no longer insist on certification elections, but it would continue to invalidate clauses in prehire agreements when it confronted them. *Id.* at 5-6.

Soon thereafter, the Senate Subcommittee on Labor and Labor-Management Relations held hearings on the construction industry. *See Hearings, supra.* Representatives of both labor and management testified that the special characteristics of the construction industry made it impracticable, unnecessary and undesirable to comply with the requirements of the Wagner Act (as amended by the Taft-Hartley Act). They pointed out that a construction worker typically works at a particular work site only for a short time. In such a context, to require formal certification elections is impracticable, for particular employees would not stay on the job long enough to elect representatives who then would bargain with the employer. Those testifying feared that the alternative to prehire bargaining would be no bargaining at all. Without prehire bargaining, unions would not be able to bargain for union security, while contractors would not be able to estimate their labor expenses in advance and would not be able to rely on a steady supply of labor from union hiring halls. *See generally* S. Rep. No. 1509, *supra*, at 3-6 (summarizing testimony at hearing).

The Senate Committee on Labor and Public Welfare then favorably reported a bill that would permit prehire agreements. It said:

> The committee finds that the normal election procedures of the Board have proven unadaptable to this industry because of the short-term, casual employment that is typical to it. The General Counsel's efforts to devise special means . . . have proven fruitless. We conclude that the obstacles to conducting

> satisfactory elections in sufficient numbers are formidable, if not insuperable.

S. Rep. No. 1509, *supra*, at 6. The bill did not become law for some time. But, in 1959, Congress enacted a similar bill. Both the House and Senate Reports accompanying the 1959 bill indicate that the reasons for the exception of § 8(f) were those identified in the 1951 hearings, namely, the short-term nature of employment, the impracticability of holding certification elections, the contractors' need for predictable cost and a steady supply of labor, and the longstanding custom of prehire bargaining in the industry. *See* S. Rep. No. 187, 86th Cong., 1st Sess., 27-29 (1959), *reprinted in* 1 NLRB *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* 423-25 (1985) [hereinafter *Legislative History*] (set out in Appendix); H.R. Rep. No. 741, 86th Cong., 1st Sess., 19-20 (1959), *reprinted in* 1 *Legislative History*, *supra*, at 777-78; *see also* 105 Cong. Rec. S5731 (daily ed. April 21, 1959), *reprinted in* 2 *Legislative History*, *supra*, at 1064 (remarks of Sen. Javits); 105 Cong. Rec. S5767 (daily ed. April 21, 1959), *reprinted in* 2 *Legislative History*, *supra*, 1082 (remarks of Sen. Goldwater); 105 Cong. Rec. H14,204 (daily ed. Aug. 11, 1959), *reprinted in* 2 *Legislative History*, *supra*, at 1577 (prepared statement of Rep. Rayburn); 105 Cong. Rec. H16,630 (daily ed. September 4, 1959), *reprinted in* 2 *Legislative History*, *supra*, at 1715 (remarks of Sen. Kennedy); 105 Cong. Rec. A4308 (daily ed. May 21, 1959), *reprinted in* 2 *Legislative History*, *supra*, at 1750 (remarks of Rep. Kearns). At the same time, Congress enacted an exception to § 8(e), so that its prohibition of hot-cargo clauses would not prevent parties in the construction industry from entering into prehire agreements, which, traditionally, included a provision requiring the general contractor to award bids only to subcontractors who would sign the prehire agreement. *See* 105 Cong. Rec. S16,414 (daily ed. September 3, 1959), *reprinted in* 2 *Legislative History*, *supra*, at 1432 (remarks of Sen.

Kennedy) (stating that the proviso of § 8(e) was "necessary to avoid serious damage to the pattern of collective bargaining in [the construction] industr[y]"); 105 Cong. Rec. S16,414 (daily ed. September 3, 1959), *reprinted in* 2 *Legislative History*, *supra*, at 1721 (remarks of Rep. Thompson) (same).

As the majority correctly points out, the construction-industry exceptions use the word "employer," and § 2(2) of the Act specifically excludes "any State" from its definition of the word "employer." *Ante*, at 23-25, 32. That fact, however, does not destroy the relevance of the exceptions as an indication of Congress's pre-emptive intent. For one thing, the provisions show that Congress specifically focused upon the conduct in question, prehire bargaining, that Congress found that conduct prevalent in the construction industry, and that it wrote the exceptions with the expectation that the conduct would continue in that industry.

For another thing, the *reasons* Congress gave for authorizing the conduct have nothing to do with the public or the private nature of the employer. The special circumstances in the construction industry making meaningful posthire collective bargaining difficult; the corresponding custom in the industry; a general contractor's need to predict labor costs; his need to have available a steady supply of labor: these reasons have to do with the nature of the construction industry and collective bargaining in that industry, conditions likely to remain the same whether a public or private contractor lets contracts for the work.

Further, to permit private general contractors, but not states, to enter into construction-industry prehire agreements would likely produce an odd crazy-quilt of prehire practices. Whether one finds such an agreement would often reflect, not size of the project, or desire of the parties, or special conditions of the industry, but

simply whether or not the entity letting the contracts is an arm of the state or private. And, even among state projects, the presence or absence of such an agreement would depend upon whether state law permits the state in question to hire a private general contractor (who, then, presumably, would be free to enter into a prehire agreement), or, as in Massachusetts, requires the state agency to sign the relevant contracts itself. *See* Mass. Gen. L. ch. 30, § 39M; *id.* ch. 149, § 44A *et seq.* We do not understand what purpose, related to labor law, these legal distinctions could serve.

Finally, Congress had two perfectly good reasons for not making the construction-industry exceptions explicitly applicable to states, and neither of these reasons suggests any pre-emptive intent. First, the obvious reason is that the list of forbidden practices, to which the exceptions apply, itself applies only to an "employer," defined to exclude "any State," thereby leaving the regulation of labor relations between a state and its own employees primarily to state law. A drafter, writing a statutory exception to the resulting prohibition, would not normally extend its scope beyond those subject to the prohibition in the first place. Second, Congress, particularly when it enacted the construction-industry exceptions in 1959, had little reason to believe that a court might find, hidden in the silence of the Act, some other relevant prohibition applicable to a state.

In sum, the construction-industry exceptions in the Act, including their history and rationale, indicate that when a state acts as an ordinary private purchaser of construction services, it can enter into a typical prehire agreement without "frustrat[ing]" the "federal [statutory] scheme." *Malone*, 435 U.S. at 504.

2. *Supreme Court Precedent.* Unlike the majority, we believe that the relevant Supreme Court decisions offer fairly strong support for our conclusions. For one thing,

the *Machinists* case itself makes clear that the Act does not forbid all state action that might favor labor, but, rather, only those state actions that interfere with Congress's "*intentional* balance." *See Golden State*, 475 U.S. at 614 (citing *Machinists*, 427 U.S. at 146) (emphasis added). Here, for reasons just mentioned, we believe Congress intended a "balance" in the construction industry that includes prehire agreements.

For another thing, the Supreme Court has looked to legislative history (indeed, the language and history of *other* congressional statutes), as we have done here, to find the existence or absence of a congressional pre-emptive intent. After examining legislative history that would seem no more significant than that present here, for example, the Court upheld a state law providing unemployment benefits to striking workers, a law that would seem to tip the playing field in the strikers' favor. *See New York Tel.*, 440 U.S. 519.

Further, the Court has indicated that the kind of state activity involved is relevant to the pre-emption question. After all, the NLRA seems basically intended to supplant state labor regulation, not to supplant all legitimate state activity that might affect labor. Thus, it is not surprising that the relevant Supreme Court cases, speaking of the area where Congress implicitly intended labor-management relations "to be controlled by the free play of economic forces," refer to freedom from state *regulation*. In *Machinists* itself, for example, the Supreme Court refers to the relevant congressional pre-emptive intent as an intent to "leave some activities *unregulated*." 427 U.S. at 144. It said that the "activities" in question —workers deciding in concert to refuse overtime work— were not to be *regulable* by States . . . ." *Id.* at 149 (emphasis added). And, in *Golden State*, the Court, finding that California could not condition the renewal of a taxicab franchise upon settlement of a labor dispute, said that "*Machinists* pre-emption . . . precludes state

and municipal *regulation* 'concerning conduct that Congress intended to be unregulated.'" 475 U.S. at 614 (quoting *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 749 (1985)) (emphasis added). At the same time, the Court has noted that even though *Machinists* pre-emption "does not involve in the first instance a balancing of state and federal interests," an "application of the State's interest in regulating a certain kind of conduct may still be relevant in determining whether Congress in fact intended the conduct to be unregulated." *Metropolitan Life*, 471 U.S. at 749-50 n.27.

Finally, when the Court has considered state *purchasing*, it has carefully considered the nature of the state's action and the legitimacy of the restriction's purpose. In *Wisconsin Department of Industry, Labor and Human Relations* v. *Gould, Inc.*, 475 U.S. 282 (1986), the Court found pre-emption of a Wisconsin purchasing-related rule —a rule that disqualified as a supplier any firm found to have committed several unfair labor practices. In doing so, the Court stressed the lack of any such legitimate relation in the case before it. The Court said that "debarment . . . serves plainly as a means of enforcing the NLRA," *id.* at 287, that it "functions *unambiguously* as a supplemental sanction for violations of the NLRA, *id.* at 288 (emphasis added), and "[*n*]*o other purpose* could credibly be ascribed." *Id.* at 287 (emphasis added). The Court concluded that, because "*Wisconsin simply is not functioning as a private purchaser of services*, for all practical purposes, Wisconsin's debarment statute is tantamount to regulation." *Id.* at 289 (emphasis added). To emphasize the point—that Wisconsin was not acting like "a private purchaser of services"—the Court added:

> We do not say that state purchasing decisions may never be influenced by labor considerations, any more than the NLRA prevents state regulatory power from ever touching on matters of industrial relations. Doubtless some state spending policies,

> like some exercises of the police power, address conduct that is of such 'peripheral concern' to the NLRA, or that implicates 'interests so deeply rooted in local feeling and responsibility,' that pre-emption should not be inferred. *Garmon*, 359 U.S. at 243-244; see also, *e.g.*, *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 498 (1983). And some spending determinations that bear on labor relations were intentionally left to the States by Congress. See *New York Tel. Co.* v. *New York State Labor Dept.*, 440 U.S. 519 (1979). But Wisconsin's debarment rule clearly falls into none of these categories. *We are not faced here with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs, or with a law that pursues a task Congress intended to leave to the States.* The manifest purpose and inevitable effect of the debarment rule is to enforce the requirements of the NLRA.

Id. at 291 (emphasis added).

In the case before us, the record makes clear that the MWRA is participating in a market place as a general contractor, like a private buyer of services. Its role as buyer is not, in any sense, a sham designed to conceal an effort to regulate. That role is direct, normal, and necessary for *purchasing*, not *regulatory*, reasons. The MWRA wants to condition its contracts in the same way as, and for the same reason as, private contractors normally insist upon similar conditions, namely to obtain peaceful working conditions, necessary to get the job done on time. The record requires us to take as given that, without a prehire agreement, hundreds of collective-bargaining agreements would expire during the life of the project, making labor strife likely. Because the major work site, Deer Island, is connected by a narrow isthmus to the mainland, a small number of pickets would find it easy to stop the entire project. Court-ordered deadlines

mean that delay would cause unusually serious problems. The record therefore supports the MWRA's contention that the prehire agreement serves its economic self-interest as a purchaser, that it is a "legitimate response to state procurement constraints or to local economic needs." *Id.*

The majority says that the language from *Gould* set out above contains only "dicta," and points out that the pre-emption at issue in *Gould* was *Garmon* pre-emption (pre-emption of state action regulating conduct that is arguably protected or forbidden by the NLRA), not *Machinists* pre-emption (pre-emption of state action regulating conduct that Congress intended to be controlled by the free play of economic forces only). Nonetheless, the "dicta" seem carefully considered, in a unanimous opinion. The fact that *Garmon* rather than *Machinists* pre-emption was at issue seems beside the point. Why would Congress want to leave the states *greater* freedom to interfere with control by the NLRB than to interfere with control by economic forces? Most important, the "dicta" suggest that the state's reasons for a labor-affecting condition are highly relevant, at least when the state is acting as an ordinary buyer. And, as we have just pointed out, the MWRA's reasons are legitimate.

In sum, the MWRA is acting like a buyer, and its reasons for the labor-related condition are legitimate. Furthermore, Congress specifically focused on the conduct in question and, in the case of private contractors, sanctioned it. In this context, we cannot say that the MWRA's actions "conflict" with the NLRA or would "frustrate" its purposes. We conclude that Congress did not pre-empt this state activity. Accordingly, we dissent. (We see no reason, since we are in dissent, to express our views on the other issues in the case, though we add that our views are similar to those of the district court.)

APPENDIX:

S. Rep. No. 187, 86th Cong., 1st Sess., 27-29 (1959).

The problems of the building and construction industry under the Taft-Hartley Act have been the subject of considerable comment by authorities in the field; and Congress in previous years has made several attempts to correct the shortcomings of the act as applied to the industry. The occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprise. An individual employee works for many employers and for none of them continuously. Jobs are frequently of short duration, depending upon various stages of construction.

During the Wagner Act period, the National Labor Relations Board declined to exercise jurisdiction over the industry not only because of these complexities but also because the industry was substantially organized and hence had no need of the protection by the act. Concepts evoked by the Board therefore developed without reference to the construction industry. In 1947, after passage of the Taft-Hartley amendments, the Board applied the provisions of the act to the building and construction industry.

That this application of the act to the construction industry has given rise to serious problems is attested by the following in which the difficulties of the industry are set forth in detail:

[citing congressional hearings and presidential messages].

The bill endeavors to resolve certain most urgent problems, leaving to the future other difficulties which require attention.

Characteristics of the industry and the bill

In the building and construction industry it is customary for employers to enter into collective bargaining agreements for periods of time running into the future, perhaps 1 year or more or in many instances as much as 3 years. Since the vast majority of building projects are of short duration, such labor agreements necessarily apply to jobs which have not been started and may not even be contemplated. The practice of signing such agreements is not entirely consistent with the Wagner Act rulings of the NLRB that exclusive bargaining contracts can lawfully be concluded only if the union makes its agreement after a representative number of employees have been hired. One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral. A substantial majority of the skilled employees in this industry constitute a pool of such help centered about their appropriate craft union. If the employer relies upon this pool of skilled craftsmen, members of the union, there is no doubt under these circumstances that the union will in fact represent a majority of the employees hired.

. . . .

The bill, as did [an earlier version], contains other provisions which take into account the occasional nature of employment in the building and construction employee. It does so by reducing from 30 days to 7 the grace period before which the employee may be required to join the union. The reduction in this time allowance reflects the normally short employment period for construction employees. Also similar to [the earlier version] are provisions permitting an

exclusive referral system or hiring hall based upon objective criteria for referral. Such criteria as are spelled out in the bill are not intended to be a definitive list but to suggest objective criteria which shall be applied without discrimination. Thus it is permissible to give preference based upon seniority, residence, or training of the sort provided by the apprenticeship programs sponsored by the Department of Labor. These provisions are not intended to diminish the right of labor organizations and employers to establish an exclusive referral system of the type permitted under existing law.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1392

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL., PLAINTIFFS, APPELLANTS

v.

THE MASSACHUSETTS WATER RESOURCES AUTHORITY, ET AL., DEFENDANTS, APPELLEES

Appeal from the United States District Court
for the District of Massachusetts

[Hon. A. David Mazzone, *U.S. District Judge*]

Before

Campbell and Torruella, *Circuit Judges*,
and Re,* *Judge*

Maurice Baskin, with whom *Carol Chandler*, *Mary L. Marshall*, *Stoneman, Chandler & Miller*, *Thomas J. Madden*, *Venable, Baetjer, Howard & Civiletti*, were on brief for appellants.

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* The Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

John M. Stevens for appellee The Massachusetts Water Resources Authority.

James J. Kelley for appellee Kaiser.

Donald J. Siegel, with whom *Mary T. Sullivan* and *Segal, Roitman & Coleman*, were on brief for appellee Building and Construction Trades Council of the Metropolitan District.

OCTOBER 24, 1990

TORRUELLA, Circuit Judge. Plaintiffs-Appellants Associated Builders and Contractors of Massachusetts/Rhode Island, Inc. ("ABC")[1] appeal the decision of the United States District Court for the District of Massachusetts denying ABC's request for a preliminary injunction. For the reasons stated below, we reverse this decision and remand for action consistent with our opinion.

I. PROCEDURAL BACKGROUND

ABC is an organization composed of individual construction contractors and trade associations representing over 18,000 "merit shop" (i.e., non-union) construction industry employers. On March 5, 1990, ABC brought suit in the United States District Court for the District of Massachusetts against the Massachusetts Water Resources Authority ("MWRA"), Kaiser Engineers, Inc. ("Kaiser") and the Building and Construction Trades Council and affiliated labor organizations[2] ("Trades Council"), challenging the legality of the bidding procedures established by MWRA to carry out $6.1 billion worth of public works known as the Boston Harbor Clean-Up Project ("Project"). ABC sought injunctive

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[1] Also its national association and five individual contractors.

[2] Thirty-four in all.

relief against enforcement of Specification 13.1 of the MWRA's bidding procedures, which provides that:

> [E]ach successful bidder and any and all levels of subcontractors, as a condition of being awarded a contract or subcontract, will agree to abide by the provisions of the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement ["the Master Labor Agreement"] as executed and effective May 22, 1989, by and between [Kaiser], on behalf of [MWRA], and the [Trades Council] . . . and will be bound by the provisions of that agreement in the same manner as any other provisions of the contract. A copy of the agreement is attached and included as part of these Contract Documents . . .

ABC claims that, as applied to its membership, Specification 13.1 effectively bars them from seeking and obtaining any bids in this multi-billion dollar, ten-year endeavor. ABC alleges irreparable injury and damages from what it perceives to be a violation of various federal and state statutes, including the Sherman Act, 15 U.S.C. § 1, and the Massachusetts public bidding statutes, Mass. Gen. Laws ch. 149, §§ 44A-44L and ch. 30, § 39M, and moves for a declaratory judgment to the effect that the challenged specification is invalid by reason of its preemption by the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 151, *et seq.*, and the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144.

The district court denied injunctive relief for reasons that will be discussed in more detail, *post*, and this appeal followed pursuant to 28 U.S.C. § 1292(a). Because of the importance of the issues raised, we granted expedited consideration.

II. THE FACTS

MWRA is a governmental agency authorized by the Massachusetts legislature to provide water supply services, sewage collection, and treatment and disposal serv-

ices for the eastern half of Massachusetts. Following a lawsuit arising out of its failure to prevent the pollution of Boston Harbor, *United States of America* v. *Metropolitan District Commission*, C.A. No. 85-0489-MA (Mazzone, J.), the MWRA was ordered to meet a detailed timetable to carry out the clean-up of that body of water. The means and methods of carrying out this task are set forth in the MWRA's enabling statute, Mass. Gen. Laws ch. 92, app. §§ 1-1, *et seq.*, and the Commonwealth's public bidding laws. Mass. Gen. Laws ch. 149, §§ 44A-44L and ch. 30, § 39M. Pursuant to these laws, the MWRA provides the funds for construction (assisted by state and federal grants), owns the property to be built, establishes all bid conditions, decides all contract awards, pays the contractors, and generally exercises control and supervision over all aspects of this project.

In the spring of 1988, the MWRA retained Kaiser as its program/construction manager. Kaiser's primary function is to manage and supervise the ongoing construction activity. In the course of performing its function, however, Kaiser could be expected to employ craft labor in certain situations. Its agreement with the MWRA permits it to act as an execution contractor, or to perform certain direct hire work as needed in cases of default or incomplete performance by other contractors, clean-up work and other limited or emergency situations.

Another important function of Kaiser is to advise the MWRA on the development of a labor relations policy which will maintain worksite harmony, labor-management peace, and overall stability during the ten-year life of the Project. The MWRA had already experienced work stoppages and informational picketing at various sites [3] and

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[3] In November of 1988, two member unions of the Trades Council picketed the Project and precipitated a brief work stoppage, which was ended by establishment of separate entrances to the job site. This is a well recognized method of maintaining continuity of work in the construction industry. Other threats were made to disrupt the work, but no other significant disruption actually occurred.

was concerned that, because of the scale of the Project and the number of different craft skills involved, it was vulnerable to numerous delays thus placing the court-ordered schedule in jeopardy and subjecting the MWRA to possible contempt orders. This concern was enhanced by the geographic location of the existing and proposed treatment facilities which makes them vulnerable to picketing and other concerted activity.[4]

The above circumstances led Kaiser to recommend to the MWRA that it be permitted to negotiate with the building and construction trades unions, through the Trades Council, in an effort to arrive at an agreement which would assure labor stability over the life of the Project. Any agreement would be subject to review and final approval by the MWRA.

The MWRA accepted Kaiser's recommendations and in early May 1989 Kaiser proceeded to meet with negotiating teams from the unions, including the Trades Council. The Master Labor Agreement was the result of their negotiations. After review by the MWRA staff, and upon its recommendation, the MWRA Board of Directors on May 28, 1989 adopted the Master Labor Agreement as the labor policy for the Project and directed that Specification 13.1 be added to the bid specification for all new construction work.

The Master Labor Agreement establishes as "the policy of the [MWRA] that the construction work covered by this Agreement shall be contracted by Contractors who

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[4] At Deer Island access to the site was by a single two-lane road passing through crowded Winthrop streets, and next to the existing Suffolk County House of Correction. Access to the facility at Nut Island is similarly constrained. Facilities being built off-island to transport workers, construction materials and equipment across the harbor to Deer Island would have to be designed or adapted to the potential for labor unrest with unions other than member unions of the Trades Council such as those representing maritime workers.

agree to execute and be bound by the terms of this Agreement." It is the duty of Kaiser on behalf of MWRA to "monitor compliance with this Agreement by all Contractors who through their execution of this Agreement, together with their subcontractors, have become bound hereto." The parties state the need to meet the "specified and limited time frames" established by the district court's order in the Boston Harbor Clean-up case. Also agreed to are binding methods for the settlement of "all misunderstandings, disputes or grievances which may arise [and] . . . the Union, agree[s] not to engage in any strike, slowdown or interruption of work [or] the [employers] . . . to engage in any lockout."

Most importantly, the Trades Council is recognized "as the sole and exclusive bargaining representative of all craft employees," and its hiring halls are made the initial and principal source for the Project's labor force. All employees are subject to the union security provisions of the agreement which require that they become union members within seven days of their employment. Employees may seek redress for their grievances only through the recognized labor organizations, and the contractors are bound by the Trades Council member unions' wage and benefit provisions and apprenticeship program. The contractors are required to make contributions to various union benefit trust funds and to observe the unions' work rules and job classifications.

The Master Labor Agreement became "effective [on] May 22, 1989, and shall continue in effect for the duration of the Project construction work." As previously indicated, the Project is expected to take ten years to complete.

III. THE PROCEEDNGS BEFORE THE DISTRICT COURT

ABC's contentions before the district court can be summarized as follows:

(1) *Preemption under the NLRA.* ABC alleged that the NLRA prohibits the MWRA from interfering with the labor negotiations process, specifically arguing that requiring employers to accept the terms of a collective bargaining agreement with a union that has not been designated as the bargaining agent by employees is illegal. The district court held that Section 8(e) and (f) of the NLRA[5] permit such restrictive agreements in the construction industry and that even if the Master Labor Agreement were to affect NLRA-regulated conduct, such impact must be considered against the manifest importance of the Boston Harbor clean-up. "The presence of *non-represented* employees simply increases the potential for continuous strife and crippling work stoppages." The court ruled that the Master Labor Agreement was lawful under the circumstances.

(2) *Preemption under ERISA.* ABC claimed that since the Agreement required employers to contribute to trust funds, the Agreement in effect regulated the terms and conditions of employee benefit plans covered under Section 514(c) of ERISA, 29 U.S.C. § 1144(c). The court disagreed, holding that the Agreement is not so broad and only applies to a single discrete project and thus does not contravene ERISA.

(3) *Equal protection and due process clause allegations.* ABC claimed that the bidding procedures discriminate against non-union contractors and effectively preclude such contractors from bidding, thus violating the equal protection and due process clauses. These claims were also rejected by the district court, which ruled that non-union contractors are not a protected class, that bidding procedures were open to all contractors, and that since ABC had failed to make any bid as of yet, a constitutionally protected right was lacking.[6]

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[5] 29 U.S.C. §§ 158(a) and (f).

[6] Analogous state claims were also rejected.

(4) *The Sherman Act claim.* ABC alleged that the Master Labor Agreement and Specification 13.1 constitute a conspiracy among appellees to reduce competition in the construction industry by effectively precluding non-union contractors. Below, the court reiterated that appellants were not excluded from the bidding process and furthermore since the Master Labor Agreement "serves legitimate business, and public purposes" there was no anti-trust violation. Moreover, the district court found that the MWRA, as a state entity, is immune from an anti-trust claim and that Section 8(e) of the NLRA along with labor's non-statutory anti-trust exemption under the Sherman Act protect Kaiser and the Trades Council as well.

(5) *State law claims.* The district court rejected ABC's state law violations claim, ruling that the Massachusetts Public Bidding statute specifically required that the winning bidder must furnish labor that can work in "harmony with all the other elements of labor employed or to be employed on the work." It further ruled that there was no interference with business relationships because no relationships existed as of yet.

Thus, the district court denied a preliminary injunction holding that first, the appellants were not likely to succeed on the merits. Second, ABC had not shown immediate and irreparable harm because it had not been awarded a contract and even if it had it would have an adequate remedy at law. Third, the balance of harm to the appellants was outweighed by the harm to the appellees, since the appellees would suffer ominous delays, disruptions, and increased costs in the Boston Harbor clean-up without Specification 13.1. And last, issue of an injunction would adversely affect the public interest in the swift clean-up of Boston Harbor.

IV. STANDARD OF REVIEW

On review, we will reverse the district court's denial of a preliminary injunction where the denial is an abuse of discretion, or is based upon a clear error of law, or where the district court's findings of fact are clearly erroneous. *See, e.g., Massachusetts Ass'n of Older Americans* v. *Sharp*, 700 F.2d 749, 751-52 (1st Cir. 1983); *Maceira* v. *Pagán*, 649 F.2d 8, 15 (1st Cir. 1981); *General Electric Co.* v. *New York State Dept. of Labor*, 891 F.2d 25, 26 (2d Cir. 1989) (reversing denial of preliminary injunction on ERISA preemption grounds); 7 Moore, *Federal Practice and Procedure* ¶ 65.04[2] (2d ed. 1987). Where, as here, appellants are asking for a mandatory injunction which will change the *status quo ante* during the pendency of litigation, we will take into account the exigencies and circumstances of the situation. *See Massachusetts Coalition of Citizens with Disabilities* v. *Civil Defense Agency*, 649 F.2d 71, 76 n.7 (1st Cir. 1981).

To be entitled to injunctive relief a party must establish that it has a likelihood of success on the merits, that it will suffer immediate and irreparable harm if relief is not granted, that such harm outweighs any harm to the non-moving party, and that the public interest will not be adversely affected. *Planned Parenthood* v. *Bellotti*, 641 F.2d 1006, 1009 (1st Cir. 1981); *Lancer* v. *Lebanon Housing Authority*, 760 F.2d 361, 362 (1st Cir. 1985). The balancing of interests shifts in plaintiffs' favor when a strong likelihood of success on the merits is shown. *SEC* v. *World Radio Mission, Inc.*, 544 F.2d 535, 541-42 (1st Cir. 1976).

V. DISCUSSION

In our opinion, appellants present a portentous argument that there is a strong likelihood of their success on the merits, an argument which ultimately carries the day.

A. *Preemption under the NLRA*

We commence with the text book proposition that under the supremacy clause of Article VI of the Constitution,[7] the "supreme" congressional law supersedes or preempts state law. Preemption occurs not only when there is an outright conflict between the federal scheme and the state requirement, but also when congressional action is an implicit barrier—*e.g.*, when state regulation interferes unduly with the accomplishment of congressional objectives. Congressional legislation in an area in which a state seeks to regulate does not necessarily preclude all state action. Nor does the fact that there is no explicit federal-state conflict or congressional statement of intent to bar state authority inescapably rule out a finding of preemption. *Cf. Guss* v. *Utah Labor Relations Board*, 353 U.S. 1 (1957).

> The question in each case is what the purpose of Congress was [in legislating] . . . . Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. Or the state policy may produce a result inconsistent with the objective of the federal statute. It is often

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[7] U.S. Const. art. VI, para. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

> a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide.

Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230-31 (1947) (citations omitted).

Turning to the specific legislation at hand, the NLRA, as amended,[8] we find that since first enacted in 1935 it "has empowered the National Labor Relations Board 'to prevent any person from engaging in any unfair labor practice . . . [defined by the Act] affecting commerce.'" 29 U.S.C. § 160(a). "By this language, and by the definition of 'affecting commerce' . . . Congress meant to reach to the full extent of its power under the Commerce Clause." *Guss* v. *Utah Labor Board*, 353 U.S. at 3. *See* 29 U.S.C. § 152(7).[9] Thus, in the area of labor relations there is "not only a general intent to pre-empt the field but also . . . [the] inescapable implication of exclusiveness." *Guss* v. *Utah Labor Board*, 353 U.S. at 10. In *Guss* the Supreme Court went so far as to carry that principle to the point of creating a no-man's land, in which no jurisdiction existed on behalf of state authorities to intervene in labor relations matters covered by the Act notwithstanding the Board's refusal to exercise dominion over such disputes. It should be noted that, although *Guss* involved unfair labor practices, the Act uses substantially similar language regarding the representation procedures established thereunder, and

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[8] 29 U.S.C. § 151, *et seq.*

[9] 29 U.S.C. § 152(7):

> The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

See NLRB v. *Bradford Dyeing Ass'n*, 310 U.S. 318, 325-26 (1940) (construing "affecting commerce").

therefore the principle established by *Guss* is of equal application to representation matters.[10]

The situation created by *Guss* led in 1959 to the amendment by Congress of Section 14 of the Act, allowing for state intervention in labor disputes affecting commerce in which the Board has specifically declined to exercise jurisdiction.[11] Prior to that amendment, as is discussed in *Guss*, *id.* at 6-7, a state could only intervene in a labor dispute affecting commerce if the Board had entered into a cession agreement pursuant to Section 10 (a) of the Act,[12] and then only if the state statute was consistent with a corresponding provision in the Act.

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[10] *See* 29 U.S.C. §§ 141(b), 151, 152, 157, 159. For example, § 159(c)(1) provides that:

> Whenever a petition shall have been filed . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation *affecting commerce* exists shall provide for an appropriate hearing upon due notice . . . (emphasis supplied).

[11] 29 U.S.C. § 164:

> (c)(1) The Board, in its discretion may, by rule of decision or by published rules adopted pursuant to subchapter II of chapter 5 of Title 5, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction under the standards prevailing upon August 1, 1959.
>
> (2) Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

[12] 29 U.S.C. § 160(a):

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power

Intervention in labor matters affecting commerce today is thus limited to cession agreements by the Board with the states under Section 10(a) of the Act, or specific declinations by the Board to intervene pursuant to Section 14(c) of the Act. There is a third category, also under Section 14 of the Act,[13] which allows the states to legislate to prohibit union shop agreements.

The Supreme Court has recognized two types of federal preemption of state and local government action in the field of labor law. First, the Supreme Court has prohibited the states from regulating activities "which are protected by Section 7 of the National Labor Relations Act, or constitute an unfair labor practice under Section 8." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 244 (1959). Second, the Court has held that state and local governments are prohibited from regulating activities which Congress intended to be left unrestricted by any governmental power. *Lodge 76, Int'l Assoc. of Machinists & Aerospace Workers* v. *Wisconsin Emp. Comm.*, 427 U.S. 132, 140 (1976).

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shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

[13] 29 U.S.C. § 164(b):

Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

While both forms of preemption are implicated by this appeal, the present case is indisputably controlled by the Supreme Court's holding in *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608 (1986), which relied on and expanded upon the *Machinists* doctrine.[14] The similarities between *Golden State* and the present case are considerable.

In *Golden State* the employer sought renewal of a taxicab operating license from the City of Los Angeles. At the time the employer was engaged in a labor dispute with the union that represented its employees. The City Council conditioned renewal of the franchise on settlement of the labor dispute by a specific date. When the strike was not settled by that date, the franchise expired. The Supreme Court ruled that the city's action in conditioning renewal of the franchise on settlement of the labor dispute was preempted by the Act. The Court stated, in language particularly apropos to the present controversy:

> Although the labor-management relationship is structured by the NLRA, certain areas intentionally have been left " 'to be controlled by the free play of economic forces.' " . . . States are therefore prohibited from imposing additional restrictions on economic weapons of self-help, . . . unless such restrictions presumably were contemplated by Congress. . . . "[T]he crucial inquiry regarding pre-emption is the same: whether 'the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes.' "

Id. at 614-15 (citations omitted). The city's insistence on a settlement was preempted by the Act because it " 'entered into the substantive aspects of the bargaining process to an extent Congress has not countenanced.' "

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[14] In *Machinists*, the Court had found unlawful a state commission's prohibition against union refusals to work overtime during collective bargaining negotiations, 427 U.S. at 148-49.

Id. at 615-16 (citations omitted). This was so because "[t]he NLRA requires an employer and a union to bargain in good faith, but it does not require them to reach agreement." *Id.* at 616.

In the present case, the state's intrusion into the bargaining process is all-pervasive. The state not only mandates that a labor agreement be reached before a bid is awarded, but dictates with whom that agreement is going to be entered, and specifies what its contents shall be. For all intents and purposes the state here *eliminates* the bargaining process altogether. Regulation of this conduct [15] is clearly central to federal labor relations and cannot be considered peripheral under the *Garmon* analysis. *San Diego Unions* v. *Garmon*, 359 U.S. at 243. *See Belknap, Inc.* v. *Hale*, 463 U.S. 491, 509 (1983) (third parties hired as strike replacements had state-law causes of action based on misrepresentations by the employer); *Automobile Workers* v. *Russell*, 356 U.S. 634, 635 (1958) (state court jurisdiction over common law tort action against union for mass picketing upheld); *Youngdahl* v. *Rainfair*, 355 U.S. 131, 132 (1957) (same re injunctive power to prevent interference with free use of streets) *Automobile Workers* v. *Wisconsin Emp. Rel. Board*, 351 U.S. 266, 274 (1956) (same re power to enjoin violent union conduct); *United Constr. Workers* v. *Laburnum Constr. Corp.*, 347 U.S. 656, 657 (1954) (state may exercise its historic powers over such traditionally local matters as public safety and order and the use of streets and highways); *Allen-Bradley Local* v. *Wisconsin Emp. Rel. Board*, 315 U.S. 740, 749 (1942) (same). Nor can it be considered that the "regulated conduct touche[s]

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[15] The fact that the state here has acted through its bidding regulations rather than its general law is irrelevant to our analysis, as "judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." *Golden State*, 475 U.S. at 614 n.5, (quoting *San Diego Unions* v. *Garmon*, 359 U.S. at 243).

interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the State of the power to act." *San Diego Unions* v. *Garmon*, 359 U.S. at 244. The regulated conduct here is the labor relations/bargaining process itself. Such processes have been ruled upon by Congress as paramount to national, not local interests. *See General Electric Co.* v. *Callahan*, 294 F.2d 60, 67 (1st Cir. 1961), *cert. dismissed*, 369 U.S. 832 (1962) (holding that a state labor board's interference with a labor contract negotiation "conflict[ed] with the national policy of free and unfettered collective bargaining").

Appellees contend that, had the Master Agreement been entered into directly between the state agency and the unions, it would be unassailable, because "[t]he National Labor Relations Act leaves regulation of the labor relations of state and local government to the States."[16] *Abood* v. *Detroit Bd. of Education*, 431 U.S. 209, 223 (1977); 29 U.S.C. § 152(2). The state's substantial participation in the Project, however, is not enough to alter its status from regulator to employer. There are insufficient indicia of an employer/employee relationship between the MWRA and the laborers.[17] Rather, the state is in its common role

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[16] There are, of course, federal statutes other than the NLRA which treat the actions of states and private parties differently. *See, e.g.*, the Sherman Antitrust Act, 15 U.S.C. §§ 1, 7 (prohibiting certain private conduct but exempting the states); the Securities Act, 15 U.S.C. § 77(c) (exempting government securities from the Act's provisions); the Civil Rights Act, 42 U.S.C. § 1983 (prohibiting certain state conduct only).

[17] The distinction between an employee and an independent contractor under the NLRA is to be determined by application of common law agency principles. *See NLRB* v. *Amber Delivery Service, Inc.*, 651 F.2d 57 (1st Cir. 1981); *Air Transit, Inc.* v. *NLRB*, 679 F.2d 1095 (1982). Under this standard, the relationship between the construction workers and the MWRA is a contracting, not an employment, relationship. For example, the MWRA does not have

of a third party purchaser. Indeed, if the state employer exclusion from the NLRA were interpreted to include all situations in which a state contracted for goods or services, the exception would seem to swallow the rule.[18] Allowing a state to impose restrictions upon all companies from which it purchases goods or services would effectively permit it to regulate labor relations between private employers and their employees.

Moreover, the Supreme Court has rejected the proposition that the state employer exclusion from the NLRA is analogous to the somewhat similar Commerce Clause market participant exception. *Wisconsin Dept. of Industry* v. *Gould*, 475 U.S. 282, 289-90 (1986). In *Gould*, the Court struck down a state statute barring repeat violators of the NLRA from bidding on state contracts. The state argued that it should not be restricted by the Commerce Clause when it acts as a market participant. The Court rejected this argument, noting first, that the state was functioning more as a regulator than as a market participant, and second, that the exception to the Commerce Clause might be broader than state action allowed under the NLRA. The Court based its analysis on the differing purposes served by the Commerce Clause and the NLRA: whereas the Commerce Clause contains " 'no indication

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the right to control the laborers' performance, nor does it pay their salaries, provide pension or other benefits, or make FICA payments on their behalf.

[18] Nevertheless, there may be situations in which a contractual relationship between the state and a private entity is such that the state would be considered an employer for the purposes of the NLRA. *See, e.g., Board of Trustees of Memorial Hosp.* v. *NLRB*, 624 F.2d 177 (10th Cir. 1980) (holding that where a private employer who has contracted to provide services to an exempt political subdivision does not retain sufficient control over the employment relationship to engage in collective bargaining . . . the exempt subdivision is deemed the true employer); *Compton* v. *National Maritime U. of America*, 533 F.2d 1270 (1st Cir. 1976) (noting that a private contractor that performs services for an exempt governmental agency may be deemed to share the exemption).

of a constitutional plan to limit the ability of the States themselves to operate in the free markets,' . . . [t]he NLRA, in contrast, was designed in large part to 'entrust administration of the labor policy for the Nation to a centralized administrative agency.'" *Id.* (citations omitted).

Thus, although the MWRA's attempt to regulate may well pass scrutiny under the Commerce Clause, it cannot survive under the NLRA. There should at this late date be no question that either because of its regulation of matters protected by § 7 of the Act (*e.g.*, the mandatory recognition of the Trades Council), *San Diego Unions* v. *Garmon*, 359 U.S. at 245, or because of its direct intrusion into the collective bargaining process, *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. at 614-15, Specification 13.1 frustrates the purposes of the Act and therefore must fall under the doctrine of pre-emption.

B. *Section 8(e) and (f) of the Act—The Construction industry exemption*

Appellees argue, and the District Court in effect ruled, that the provision of Sections 8(e) and (f) of the Act validate the Master Labor Agreement "in the context of the unique conditions which exist in the construction industry."

Section 8(e) of the Act[19] makes it an unfair labor practice for an employer and a union to enter into what

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[19] 29 U.S.C. § 158(a) states in part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organi-

is commonly referred to as a "hot cargo" agreement. Under a "hot cargo" agreement, generally, the employer binds itself not to do business with another employer or person. These type of agreements developed out of situations in which unions did not want their members to be working or handling "struck" goods. Section 8(e), however, contains a limited exemption for the construction industry, "relating to the contracting or subcontracting of work to be done at the site of the construction." Thus "hot cargo" agreements are legal to this circumscribed extent, in the construction industry.

Section 8(f) of the Act [20] creates another exception for the building and construction industry by allowing cer-

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zation and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: . . .

[20] 29 U.S.C. § 158(f):

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or

tain actions, which would otherwise be prohibited as unfair labor practices, by employers and unions in that line of work. Thus a construction industry employer may enter into a so-called "pre-hire" agreement with a union, *e.g.*, a collective bargaining agreement wherein the union's representative status is immaterial and in fact is usually entered into prior to the hiring of any employees. Furthermore, such an agreement may contain a union shop provision requiring membership in the union seven days after hiring, 29 U.S.C. § 158(f)(2), which would otherwise be illegal;[21] a requirement that the employer notify the union of job openings giving the labor organization an opportunity to refer qualified job workers, 29 U.S.C. § 158(f)(3); as well as a condition establishing minimum training or experience qualification and area-wide seniority. 29 U.S.C. § 158(f)(4).

A construction industry labor contract entered into under the exceptional provisions of Section 8(f) is not, as specifically stated in the final proviso of that section, a bar to a petition for election, be it by a rival union,[22] by the employer[23] or by the employees themselves.[24] If the employees elect a rival union as their bargaining agent, neither the winning union nor the employer are required to assume the 8(f) contract. If the employees reject the 8(f) contracting union as their bargaining agent and do not choose another bargaining agent, the contract is

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in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a) (3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

[21] The usual provision is 30 days. *See* 29 U.S.C. § 158(a)(3).

[22] 29 U.S.C. § 159(c)(1)(A).

[23] 29 U.S.C. § 159(c)(1)(B).

[24] 29 U.C.C. § 159(e)(1).

totally void because one of the contracting parties is disqualified.

It is apparent from the above that under the exceptions established by Sections 8(e) and (f) of the Act, the Master Labor Agreement between the Trades Council and Kaiser, is a valid labor contract. *See Jim McNeff, Inc.* v. *Todd*, 461 U.S. 260, 265-66 (1983). That conclusion, however, is irrelevant. Appellants do not challenge the validity of that agreement, they contest the legality of Specification 13.1, which establishes recognition of the Trades Council and signing of the Master Labor Agreement as a condition of the award of an MWRA bid. On said issue, Sections 8(e) and (f) have no bearing, except as reinforcement for appellants' preemption arguments. It is clear, both from their nature and history, that Congress extensively debated and considered these controversial provisions before their enactment. *See generally*, 1959 U.S. Code Cong. & Admin. News, p. 2318. It is unlikely that Congress intended to leave open to Balkanization by the states, such core areas as unfair labor practices and collective bargaining, which are the matters inescapably arising from Sections 8(e) and (f) problems. There can be no question but that in enacting these exceptional provisions Congress occupied the field to the exclusion of Specification 13.1. *Guss* v. *Utah Labor Board*, 353 U.S. at 10. In short, although the Master Labor Agreement is a valid contract pursuant to Sections 8(e) and (f) of the Act, Specification 13.1 must be struck down as unduly interfering with the area of labor negotiations Congress intended to leave unregulated under the same statute.

C. *State interests*

The district judge, in a commendable attempt to harmonize the irreconcilable conflicts presented by this difficult case, reasoned that even if the Master Labor Agreement "were to have some impact on NLRA-regulated con-

duct, that impact must be considered in the light of important state interest, namely the scheduled and court-ordered completion of the harbor clean-up expeditiously and without unnecessary expense." In effect, the court held that this public purpose sanitized its constitutional shortfalls. While we do not totally fault the court's efforts in this respect, nor disagree as to the importance of the Boston Harbor clean-up, it cannot be said that congressional concern for a uniform, national labor policy as embodied in the NLRA, is entitled to secondary deference.

There are few areas in which local interest can be more legitimately exercised than in protecting the public from financial hardship caused by fiscally irresponsible persons using the state highways. Yet the Supreme Court invalidated a state statute whose purpose was resolution of such a dilemma because it concluded that it conflicted with the Federal Bankruptcy Act. *Pérez* v. *Campbell*, 402 U.S. 637, 656 (1971). The Court rejected the argument that the purpose of the state law, rather than its effect on the operation of federal legislation, should govern its validity. Even if the state claimed to be concerned with promotion of highway safety, such a statute could not stand if it conflicted with the federal scheme: "[S]uch a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective —that would be tangentially furthered by the proposed state law." *Id.* at 652.

Although the local concerns that led to the promulgation of Specification 13.1—"labor harmony during [the] life . . . [of] . . . this critical project"—are laudable, they conflict with paramount federal law and must therefore fall. We should add that we are in any event somewhat skeptical of the *pax industrial* which the Master Labor Agreement utopically promotes. This peaceable kingdom may be somewhat less than attainable considering that

this contract is no bar to rival, or for that matter, anti-union, activity. *See* 29 U.S.C. § 158(f), *last proviso.*

D. *Other Allegations*

In view of our ruling on the issue of preemption of Specification 13.1 by the Act, it is unnecessary for us to reach the other questions raised by the appeal. *See Lane* v. *First National Bank of Boston*, 871 F.2d 166, 168 (1st Cir. 1989).

VI. CONCLUSION

Specification 13.1 unduly restricts aspects of the labor-management relationship intentionally left unregulated by Congress and is thus preempted by the National Labor Relations Act, as amended. 29 U.S.C. § 151, *et seq.* The decision of the district court is reversed and mandate shall ensue forthwith with instructions to the district court that it issue an order preliminarily enjoining enforcement of Specification 13.1.

Reversed and remanded.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 90-10576-MA

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL., PLAINTIFFS

vs.

THE MASSACHUSETTS WATER RESOURCES AUTHORITY, ET AL., DEFENDANTS

MEMORANDUM AND ORDER

Mazzone, D.J. April 11, 1990

This is an action for damages, injunctive and declaratory relief, at the heart of which is the Boston Harbor clean-up project. The plaintiffs, Associates Builders and Contractors of Massachusetts/Rhode Island, Inc. (ABC), its national organization and five individual contractors, seek to enjoin the defendants, The Massachusetts Water Resources Authority (MWRA), its project manager, Kaiser Engineers, Inc. (Kaiser), and the Building and Construction Trades Council (Council), from enforcing Specification 13.1 of the MWRA's bid procedures. Specification 13.1 requires that all successful bidders on construction contracts affecting the harbor clean-up agree to observe the Boston Harbor Wastewater Treatment Facilities Agreement (Agreement). The Agreement, in turn, requires that the Council's member unions, thirty-four in all, serve as the exclusive bargaining representative for

all employees on project contracts; that all employees must be referred by local union hiring halls; that all employees are subject to the union's compulsory membership provisions; that all employees are governed by the unions' wage and benefit provisions, contributions, and union work rules and job classifications.

The plaintiffs' position is straightforward. They claim that without injunctive relief, the plaintiffs are effectively prevented from obtaining work on this multi-billion dollar, ten-year, public works project. Affidavits submitted by ABC, its national organization and the plaintiff contractors allege that all construction contracts should be awarded to the lowest, responsible bidder through open and competitive bidding regardless of labor affiliation. If this practice were followed, they say, the taxpayers and consumers would receive the most value for their construction dollar. These non-union contractors, though ready, willing and able to perform on project contracts have not, and will not bid on any contracts because of the restrictive requirements of the Agreement. They seek damages for violations of the anti-trust provisions of the Sherman Act, 15 U.S.C. § 1, and certain state common law torts. They also seek a declaratory judgment: that the Agreement is pre-empted by the National Labor Relations Act (NLRA) and the Employee Retirement Income Security Act (ERISA); that the Agreement denies the plaintiffs' due process and equal protection rights under the state and federal constitutions; and, finally, that the Agreement violates the Massachusetts public bidding statutes.

On that record, the plaintiffs claim they have satisfied the criteria necessary for injunctive relief, namely: they have demonstrated a likelihood of success; will suffer immediate and irreparable harm if relief is not granted; such harm outweighs any harm to the defendants, and, the public interest will not be adversely affected. *Planned Parenthood* v. *Bellotti*, 641 F.2d 1006, 1009 (1st Cir.

1981). Pursuant to Rule 52, Fed. R. Civ. P., and after review of the entire record, including all affidavits, and after hearing, I make the following findings of fact and conclusions of law.

I.

The MWRA is responsible for the Boston Harbor clean-up project pursuant to orders and a schedule established by this Court. *See* Memorandum and Orders issued on September 5, 1985, December 23, 1985 and May 8, 1986, in *United States of America* v. *Metropolitan District Commission, et al.*, Civil Action No. 85-489-MA. In April, 1988, the MWRA retained Kaiser as its program/construction manager. Kaiser's primary function is to manage and supervise the ongoing construction activity. In the course of performing its function, however, Kaiser could be expected to employ craft labor in certain situations. Its agreement with the MWRA permits it to act as an execution contractor or to perform certain direct hire work as needed in cases of default or incomplete performance by other contractors, clean-up work, and other limited or emergency situations. Another important function of Kaiser was to advise the MWRA on the development of a labor relations policy which would maintain worksite harmony, labor-management peace and overall stability during the ten year course of the project. The MWRA had already experienced work stoppages and informational picketing at various sites and was concerned that because of the scale of the project and the number of different craft skills involved, the project was vulnerable to numerous delays, thus placing the court-ordered schedule in jeopardy and subjecting it to the contempt orders of this Court. This concern was enhanced by the geographic location of the existing and proposed treatment facilities, especially at Deer Island where access to the site was by a single two lane road, through crowded Winthrop streets, and past the existing Suffolk County House of Correction. Access to the facility at Nut Island is similarly constrained. Proposed

facilities being built off-island to transport workers, construction materials and equipment across the harbor to Deer Island would have to be designed or adapted to the potential for labor unrest with unions other than member unions of the Council, such as the maritime workers' union.

Kaiser, by virtue of its extensive experience on large construction projects and its dealings with hundreds of building trade unions, recognized and understood the need for labor peace and stability on a project of this magnitude. It was aware that the MWRA was operating under court-mandated milestones and it knew of the significant union presence in the Boston area. A major concern was the location of the work sites and the pressure points at which labor demonstrations could choke the movement of personnel and material. Accordingly, Kaiser recommended to the MWRA that it be permitted to negotiate with the building and construction trades unions, through the Council, in an effort to arrive at an agreement which would assure labor stability over the life of the project. Any agreement was subject to review and final approval of the MWRA.

The MWRA accepted Kaiser's recommendations and in early May, 1989, negotiating teams from the unions and Kaiser met. The Agreement was the result of their negotiations. Its principal provisions were standardization of working conditions for all construction employees, particularly hours and travel pay, a ten-year no-strike clause and an effective and expeditious dispute resolution mechanism. After review of the MWRA staff and upon its recommendation, the MWRA Board of Directors, an May 28, 1989, adopted the Agreement as the labor policy for the project and directed that Specification 13.1 be added to the bid specification for all new construction work. The purpose was to achieve jobsite labor harmony in order to maintain the court-ordered schedule and avoid the risk of substantial fines for non-compliance. In the

absence of such an agreement, legitimate labor disagreements and demonstrations would lead to delays in construction, resulting in increased costs to the MWRA. And, of course, delays will mean that Boston Harbor would continue to be subjected to environmental abuse.

Against this factual backdrop, I turn to the criteria for injunctive relief. I focus primarily on the likelihood that the plaintiffs will succeed on the merits and their claims and deal *seriatim* with the specific grounds asserted.

1. *Preemption Under the NLRA*

The plaintiffs say that because the MWRA, a public agency, has dictated the terms of the Agreement under which the ABC contractors can work, but has not allowed those contractors to participate in the negotiations that produced the Agreement, it has impermissibly intruded into the area of labor law preempted by the NLRA. Citing *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608 (1986) and *Hydrostorage, Inc.* v. *Northern California Boilermakers Local Joint Apprenticeship Committee*, [685] F. Supp. 718 (N.D. Cal. 1988), *aff'd*, 891 F.2d 719 (9th Cir. 1989); the plaintiffs' claim that the NLRA guarantees them the right to bargain independently with only those unions designated by their own employees. Therefore, the question presented is whether by virtue of the Agreement, there has been some interference by either the MWRA or Kaiser in an area which Congress sought to leave unregulated.

As clear as the plaintiffs posit their claim, it is equally clear that Congress addressed that claim in the context of the unique conditions which exist in the construction industry. Sections 8(e) and 8(f), NLRA; *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975). Section 8(e) contains a proviso expressly permitting restrictive agreements which bind other secondary employers, such as the plaintiffs, when,

as is the fact here, Kaiser plans to employ some employees at the site. *Morrison-Knudsen Co., Inc. NLRB Advice Memorandum*, March 27, 1986. Section 8(f) allows construction labor agreements that condition employment upon a willingness to abide by union rules, even though the employees did not designate the unions as their representative. *NLRB* v. *Ironworkers*, 434 U.S. 335. These special privileges for the construction industry were necessary, Congress found, to alleviate the serious problems arising out of the unique practices of the construction industry. *NLRB* v. *Ironworkers, supra. Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645 (1982).

Even if this Agreement were to have some impact on NLRA-regulated conduct, that impact must be considered in the light of important state interests, namely the scheduled and court-ordered completion of the harbor clean-up expeditiously and without unnecessary expense. The scope of preemption requires an examination of "the state interests in regulating the conduct in question and the potential for interference with the federal regulatory scheme." *Farmer* v. *United Brotherhood of Carpenters*, 430 U.S. 290, 297 (1977); *Beckwith* v. *United Parcel Service, Inc.*, No. 89-1476, slip op. (1st Cir. November 16, 1989). This critical project compels labor harmony during its life. Given the many, different crafts involved, and the number of separate contracts necessary and the probability of local, isolated, jurisdictional disputes among *represented* employees could bring the project to a halt at any time and on a perfectly lawful basis. The presence of *non-represented* employees simply increases the potential for continuous strife and crippling work stoppages.

Under the circumstances present in this case, I believe the Agreement is lawful.

2. *Preemption Under ERISA*

Pursuant to Section 514(a), 29 U.S.C. § 1144(a), ERISA preempts all state laws which relate to an em-

ployee benefit plan. The plaintiffs claim that this Agreement requires employers to contribute to trust funds and, thus, it purports to regulate the terms and conditions of employee benefit plans as defined by Section 514(c). *Hydrostorage, Inc., supra.*

Unlike the situation presented in *Hydrostorage, supra,* this Agreement applies to a single, discrete project. It does not apply to all state contracts or to all employers doing business in the state. The state's concern here is to maintain labor harmony on a single, albeit large, public works project that presents the variety of problems set out above. The Agreement does not purport to regulate the terms and conditions of employee benefit plans. Section 514(c), ERISA. No specific plan or benefit is mandated. The agreement simply requires successful bidders to abide by negotiated conditions which can be altered or modified during the life of the contract. Whatever effect the Agreement may have on employee benefit plans is too remote or peripheral to constitute state law. *Wisconsin Department of Industry, Labor and Human Relations* v. *Gould, Inc.*, 475 U.S. 282, 281 (1986). *Shaw* v. *Delta Airlines*, 463 U.S. 85, 100 n.21 (1983).

3. *The Fourteenth Amendment Claims.*

(a) *Equal Protection.*

The plaintiffs claim, that in reacting to a threat of labor unrest, the MWRA is effectively sponsoring discrimination against non-union contractors, and discriminating in favor of organized labor. *City of Richmond* v. *J.A. Croson*, 109 S. Ct. 706 (1989).

This argument fails for two reasons. First, non-union contractors do not constitute a protected class for purposes of equal protection analysis. *Hoke Co.* v. *TVA*, 854 F.2d 820, 828 (6th Cir. 1988). All contractors are invited to bid on the same terms. No contractor is favored under the bid procedures even though a non-union

contractor may be required to conform to certain terms and conditions under which a union contractor already operates. Secondly, if there were disparate treatment, the state's interest in eliminating disruption and delay on the project provides a rational basis for the Agreement. *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

(b) *Due Process*

The plaintiffs claim that by incorporating the Agreement into its bid procedures, the MWRA is effectively precluding the plaintiff contractors from bidding, and thus, is depriving non-union contractors of a protected property interest in an award or consideration for a contract.

First, the plaintiff contractors have not bid on any contract and, therefore, cannot claim that they were denied access to the bidding process or denied the fair application of the bidding procedures. *Smith & Wesson* v. *United States*, 782 F.2d 1074 (1st Cir. 1986); *Three Rivers Cablevision, Inc.* v. *City of Pittsburgh*, 502 F. Supp. 1118 (W.D. Pa. 1980). Moreover, they are unable to specify any entitlement to a contract, other than to voice a desire to bid unencumbered by the terms of the Agreement. This is not sufficient to establish a constitutionally protected right under the Fourteenth Amendment. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). Accordingly, the plaintiffs have not been denied a fair consideration for the award of any contract.

4. *Violation of the Sherman Act, 15 U.S.C. § 1*

The plaintiffs claim that the Agreement and its incorporation by Specification 13.1 demonstrates a conspiracy among the defendants, fueled by the coercive tactics of the Council, to reduce competition in the construction industry by effectively precluding non-union contractors from bidding on harbor clean-up contracts.

Again, it must be pointed out that the plaintiff contractors have not been excluded from bidding. They

simply have refused to bid on any contract because of what they term is their principled unwillingness to submit to the conditions laid down by the MWRA. Even if the MWRA's position could be termed a refusal to deal, such a refusal would not be unreasonable. The MWRA's purpose has always been to maintain the court-ordered schedule at the greatest cost savings by reducing the potential of work stoppages due to labor unrest. This Agreement serves a legitimate business, and public purpose and, thus, does not violate the anti-trust laws. E.g., *Auburn News Co.* v. *Providence Journal Co.*, 659 F.2d 273, 278 (1st Cir. 1981); *cert. denied*, 454 U.S. 921 (1982). Moreover, the state action doctrine bars this claim. *Parker* v. *Brown*, 317 U.S. 341 (1943). As a state entity the MWRA is immune from an anti-trust claim. *Interface Group, Inc.* v. *Massachusetts Port Authority*, 816 F.2d 9, 13 (1st Cir. 1987). This doctrine also bars the anti-trust claims against Kaiser. *See Southern Motors Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 56-59 (1985).

Finally, the claim against Kaiser and the Council is based on their execution of the Agreement. That claim is barred by Section 8(e) of the NLRA and labor's non-statutory anti-trust exemption under the Sherman Act. As the facts show, Kaiser's employees will be covered by the Agreement and, thus, Kaiser will be treated in the same manner as all other contractors. *Woelke & Romero Framing, Inc.* v. *NLRB*, *supra.*

5. *The Massachusetts Public Bidding Statutes*

The plaintiffs next claim is that the Agreement violates the public bidding statutes of Massachusetts, because it effectively precludes non-union bidders. G.L. c. 30, § 39M and G.L. c. 39, § 44A.

The short answer to this claim is in the language of the statutes. Passing the question of standing to raise this issue, the statutes require the MWRA to award work

to the "lowest responsible and eligible" bidder who "shall certify that (it) is able to furnish labor that can work in harmony with all the other elements of labor employed or to be employed on the work." G.L. c. 30 § 39M(c), G.L. c. 149 44A(1). The MWRA has the authority to make that determination and its determination will be upheld unless it is arbitrary, capricious or made in bad faith. *Modern Continental Construction Company, Inc.* v. *Massachusetts Port Authority*, 369 Mass. 825 (1975). *See also* Opinion of February 16, 1990, Executive Office of Labor, Department of Labor and Industries, Exhibit D to Complaint.

6. *The Massachusetts Constitutional and State Law Claims.*

These claims fail for a variety of reasons, some of which are discussed above and the remaining issues require no more than a brief note. There can be no interference with advantageous business relationships because the MWRA has not refused, nor will it refuse to enter into any contract that conforms to the terms of the Agreement, nor is there anything in the record to show that Kaiser or the Council is procuring or attempting to procure such refusals. The state constitutional and civil rights claims like their federal counterparts above, fail to identify the particular right or interest which has been violated or denied. See generally *Associates Builders and Contractors of Kentuckyiana, Inc.* and *River City Development Corporation* v. *Ohbayash Corporation*, No. 87-38 (D. Ken. October 26, 1987).

III.

Based on the foregoing findings and conclusions, the plaintiffs are not entitled to preliminary injunctive relief.

1. As the above discussion indicates, the plaintiffs have failed to demonstrate a likelihood of success on the merits.

2. The plaintiffs will suffer no immediate and irreparable injury. After waiting over nine months to bring this motion, the plaintiffs have not bid on any contract for which they claim they are eligible. Had they bid and been awarded a contract, they would have suffered no harm.[1] Had they bid and been denied a contract, they would be in a position to claim damages if the Agreement were later shown to be illegal.

3. The harm to the plaintiffs is outweighed by the harm to the defendants. First, the plaintiffs are not precluded from bidding. And since the plaintiffs agree they must pay at least the prevailing wage on this project, their harm appears limited to a violation of their announced principle that they should not be required to recognize unions and union regulations that have not been designated by their employees. Other than this project, the non-union contractors are free to operate on their own terms on any other job and they are free to litigate the validity of the Agreement and, if successful, establish their damages.

On other hand, the defendants will suffer serious harm in the absence of this Agreement. Disruption, delays and increased costs to the ratepayers and taxpayers are virtually certain to occur without the means to eliminate

---

[1] At hearing, counsel for ABC advised the Court that one contract awarded by the MWRA to DEC-TAM Corporation, a non-union contractor, had been cancelled because of the Agreement. An affidavit supporting that statement was later filed by the executive vice-president of ABC.

That affidavit was followed in short order by an affidavit from the MWRA indicating that the contract, for asbestos removal from three engines, was not for services subject to the Agreement and was awarded to the only bidder in response to limited advertising. After work was completed on one engine which was urgently needed, the contract was cancelled because the other two engines were in sufficiently good condition for emergency, stand-by duty and the price was too high. If further work were needed, the MWRA will advertise more extensively to obtain the lowest price.

the basic conflicts and without the mechanism to resolve anticipated disputes.

4. The public interest will be adversely affected were the injunction to issue. As the foregoing makes evident, the Agreement insures that the long overdue harbor clean-up will not be delayed by labor disharmony. The right of the public to an unpolluted harbor, maintaining the schedule for the clean-up and controlling its cost are vital concerns.

The plaintiffs are careful to point out that they do not seek to delay the Boston Harbor clean-up project, but only to provide high quality construction work at lower costs, with greater flexibility and freedom than would be possible if they were to operate under restrictive union agreements. They are also careful to say they do not oppose the entire Agreement, and would be bound by the no-strike clause, most of the dispute resolution provisions and standardized work hours. They simply oppose those provisions which compel recognition of unions or which compel them to adopt specific union contracts.

This position seems to ignore Congress' purpose in enacting Sections 8(e) and 8(f), NLRA, to address the reality of the unique conditions in the construction industry. That reality is present in the circumstances of this case, and under those circumstances, I conclude the Agreement is not unfair or illegal.

Accordingly, the motion for preliminary injunction is denied.

SO ORDERED.

/s/ A. David Mazzone
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1392

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC.,
PLAINTIFF, APPELLANT

v.

THE MASSACHUSETTS WATER RESOURCES AUTHORITY,
ET AL., DEFENDANTS, APPELLEES

Before

Breyer, *Chief Judge*,
Campbell, Torruella, Selya and Cyr, *Circuit Judges*

ORDER OF COURT

Entered: January 3, 1991

The Building and Construction Trades Council of The Metropolitan District petitions this Court to rehear en banc the above-captioned case. We hereby grant the petition. This Court's mandate is recalled, the panel-opinion is withdrawn and the judgment is vacated. Argument will be heard on February 4, 1991. The briefing schedule shall be as follows: The appellant will file its brief on or before January 17, 1991 and the appellees will file their briefs on or before January 24, 1991. The en banc

panel will refer to the briefs filed before the original panel.

While the parties are free to raise and to discuss the arguments they consider relevant and important, the court wishes to be certain that the parties discuss the following:

> Is MWRA's insistence upon the labor conditions at issue reasonably related to an important proprietary interest of the state, a legitimate response to state procurement constraints, or a legitimate response to local economic needs?
>
> If so, is that insistence therefore lawful, *Wisconsin Department of Industry* v. *Gould, Inc.*, 475 U.S. 282, 291 (1986) and *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608 (1986), being distinguishable in this respect?

By the Court:

/s/ Francis P. Scigliano
Clerk

[Cert. cc: Clerk, U.S.D.C. of Massachusetts, cc: Messrs: Baskin, Kelley]

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
Civil Division

Civil Action #90-105-76-MA

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL., PLAINTIFFS

v.

THE MASSACHUSETTS WATER RESOURCES AUTHORITY, ET AL., DEFENDANTS

ORDER

[Filed Nov. 10, 1990]

Upon consideration of Plaintiffs' Motion for a Preliminary Injunction and the mandate of the Court of Appeals entered on October 25, 1990, it is, this 9th day of November, 1990,

ORDERED that Piaintiffs' request for a Preliminary Injunction is hereby granted and Defendants are hereby enjoined from enforcing MWRA Bid Specification 13.1 in connection with the Boston Harbor Wastewater Treatment Project.

/s/ A. David Mazzone
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1392

ASSOCIATED BUILDERS AND CONTRACTORS
OF MASSACHUSETTS/RHODE ISLAND, INC.,
PLAINTIFF, APPELLANT

v.

THE MASSACHUSETTS WATER RESOURCES AUTHORITY,
ET AL., DEFENDANTS, APPELLEES

ORDER OF COURT

Entered: January 10, 1991

The court of appeals has decided to grant the appellants' motion to maintain in effect the district court's injunction against the use of Bid Specification 13.1 pending the outcome of this appeal. This determination reflects the full court's decision not to alter the existing situation as of the time the full court vacated the panel's decision, and it is not meant to imply any view about the merits of the appeal. Because, after the filing of appellants' motion (on January 7, 1991), the district court (on January 9, 1991) dissolved its injunction, the court of appeals orders the following:

> The court of appeals, while retaining jurisdiction over this case, remands the case to the district court for the sole purpose of re-entering the injunction that was in effect from November 9, 1990, through January 9, 1991, pending further order of this court.

By the Court:

/s/ Francis P. Scigliano
Clerk

APPENDIX G

UNITED STATES GOVERNMENT
National Labor Relations Board

[NLRB Logo]

Date: June 25, 1990
8(e) Chron
8(f) Chron
584-5000

Memorandum

To: Rosemary Pye, Regional Director
Region 1

From: Harold J. Datz, Associate General Counsel
Division of Advice

Subject: Building & Trades Council, et al
(Kaiser Engineers, Inc.)
Case 1-CE-71

This case was submitted for advice as to: (a) whether a provision in a contract is a "hot cargo" agreement; and (b) if so, whether it is privileged by the construction industry proviso of Section 8(e).

Facts

The Massachusetts Water Resources Authority (MWRA) is responsible for the Boston Harbor clean-up project under a federal court order pursuant to the Clean Water Act.[1] In April 1988, the MWRA chose Kaiser Engineers, Inc. (Employer), a well known general contractor and construction manager, to be the program/construction manager for the project.

As construction manager, the Employer is required to manage and supervise the project, including planning,

[1] The court order also imposes a time table for the project which involves construction of wastewater treatment facilities for the Boston Harbor.

procurement, budget, scheduling and labor relations matters. Because of concerns about possible conflicts of interest arising from the program/construction manager's role, the MWRA has barred the Employer from bidding on any of the construction work for the project. However, with MWRA approval, the Employer intends to employ construction trades employees on the project in certain limited circumstances.[2]

In May 1989, the Employer entered into a project agreement (Agreement) with the Building and Trades Council and approximately 40 local and international construction trade unions (Unions) for the construction work on the Harbor project.[3] The Agreement provides standardized working conditions for all construction employees.[4] It also provides that all construction subcontractors must agree to be bound by the Agreement.

In March 1990, the Associated Builders and Contractors of Massachusetts/Rhode Island (ABC) brought a civil action, including a request for a preliminary injunction, attacking the legality of the Agreement on various grounds.[5] On April 11, 1990, the district court denied the request for preliminary injunctive relief. The court found, inter alia, that the Agreement was lawful under the proviso to Section 8(e) and under Section 8(f).

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[2] M.G.L. Chapter 30, Section 39M requires that any work performed for the Commonwealth of Massachusetts must be put out to bid if the cost of that work exceeds $5,000. The MWRA and the Employer agree that the Employer can perform certain construction work in cases of default or incomplete performance by other contractors, clean-up and temporary work, and in other limited emergency situations which would cost $5,000 or less.

[3] There is no contention that the Employer acted as an agent of MWRA rather than as a principal when it signed the Agreement.

[4] Article II of the agreement provides that any construction work the Employer performs will also be covered by the Agreement.

[5] Among other grounds, ABC argued that the Agreement, whose terms were approved by the MWRA, was preempted by the NLRA.

On March 14, 1990, the Utility Contractors Association of New England (UCA) filed the instant charge alleging that the Agreement was in violation of Section 8(e). UCA contends that the provision is not privileged by the construction industry proviso to Section 8(e) since the Employer does not and will not employ any employees on the project.[6] UCA further contends that even if the Employer employs any craft employees the Agreement is still not valid as it was entered into by the MWRA as a result of unlawful secondary pressure. In this regard, UCA relies on picketing by several Unions at other MWRA jobsites prior to the negotiation of the Agreement. Lastly, the UCA contends that even if the Agreement is lawful in general, it is unlawful with respect to surveyors since it does not cover surveyors employed by the Employer.

Action

We conclude that the provision is a "hot cargo" agreement within the ambit of Section 8(e). We further conclude that the provision was lawful under the construction industry proviso to Section 8(e).

Initially, we concluded that the clause is a "union signatory" clause and is secondary and within the ambit of 8(e). The agreement between the Employer and the Unions requires that all subcontractors on the site must be bound by the Agreement.[7] In essence, the Employer cannot do business with companies who do not agree to bound to the Union contract. Thus, the Agreement would

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[6] UCA disagrees with MWRA and the Employer that the Employer can perform certain construction work on the project. It argues that the Employer is prohibited by state law from doing any construction work on the project without first bidding for it. Since the MWRA has barred the Employer from bidding on any construction work, the UCA argues that the Employer will not be able to perform any construction work on the project.

[7] *Orange Belt District Council of Painters No. 48 (Maloney Specialties, Inc.)*, 276 NLRB 1372, 1387 (1985).

violate Section 8(e) unless it is encompassed by the construction industry proviso to Section 8(e).

The Supreme Court has held that the construction industry proviso to Section 8(e) authorizes a "union signatory" clause by a union and an employer in the construction industry in the context of a collective bargaining relationship.[8] In the instant case, it first must be determined whether the Employer is an employer in the construction industry. The Employer is a well-known general contractor and construction manager. Indeed, in the instant case, the Employer's main responsibility is to supervise the project, including planning, procurement, budget, scheduling, and labor relations. In addition, the Employer will employ employees on the project. Where, as here, an employer's principal business is in the construction industry, and it is acting as an employer of construction employees on the particular project, it is clear that such an employer is "an employer in the construction industry" for purposes of Section 8(e).[9] Moreover, even if an employer's principal business is not in the construction industry, but it acts as the general contractor on a specific construction project, the Board finds it to be an employer in the construction industry based on the degree of control it retains over the labor relations at the jobsite.[10] As noted, supra, the Employer's prime responsibility in this case is to supervise labor relations on the jobsite.

Next, it must be determined whether the Agreement was entered into in the context of a collective bargaining relationship. A Section 8(f) relationship satisfies this

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[8] See *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616, 633 (1975).

[9] *United Brotherhood of Carpenters and Joiners of America (Longs Drug Store, Inc.)*, 278 NLRB 440, 442 (1986).

[10] *Los Angeles Building & Construction Trades Council (Church's Fried Chicken, Inc.)*, 183 NLRB 1032 (1970).

requirement.[11] In the instant case, the Employer entered into a Section 8(f) pre-hire contract with the Unions.

The Charging Party contends that there can be no bargaining relationship of any kind unless the Employer hires and intends to hire employees covered by the Agreement. The General Counsel has authorized 8(e) proceedings where the employer did not hire and did not intend to hire any construction employees.[12] However, in the instant case, the Employer intends to employ craft employees on the project, and these employees will be covered by the Agreement.[13] Thus, it is clear that the Employer entered into a valid Section 8(f) relationship. Accordingly, the Agreement is protected by the proviso.

This conclusion is consistent with the district court's opinion.

Furthermore, we conclude that there is insufficient evidence to find that the Agreement was entered into as a result of unlawful secondary pressure. The picketing has not been established as unlawful. In addition, the picketing involved the MWRA, not the Employer. Moreover, none of the described activity was engaged in for the purpose of forcing the Employer or any other employer to enter into a "hot cargo" contract.

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[11] *Los Angeles Building & Construction Trades Council (Donald Shriver, Inc.)*, 239 NLRB 264, 267-70 (1978), enfd. 635 F.2d 859, 872-876 (D.C. Cir. 1980), cert. denied 451 U.S. 976 (1981); *A.L. Adams Construction Co. v. Georgia Power Co.*, 557 F.Supp. 168, 174-77 (1983), affd. 733 F.2d 853, 856-58 (11th Cir. 1984), cert. denied 471 U.S. 1075 (1985).

[12] *Plumbers Union Local 246 (Marlin Mechanical, Inc.)*, Case 32-CE-52 (1989).

[13] UCA contends that, under state law, Kaiser cannot lawfully employ employees to perform work on this site. However, the state agency, MWRA, has decided that the Employer can do so, and the Employer intends to do so. In these circumstances, we do not consider it within our province to rule on the state law question.

With respect to the surveyors, UCA asserts that the Employer's surveyors will not be covered by the Agreement. However, the fact is that they will be covered. The UCA's mistaken belief apparently stems from the fact that the Employer's professional engineers, who use surveyor equipment, are not covered by the Agreement. It does not appear that the "union-signatory" requirement extends to subcontractors who employ professional engineers.

Based on the above, we conclude that the instant charge should be dismissed, absent withdrawal.

/s/ HJD
H.J.D.

ROF-3
y:kaiser.lfa

APPENDIX H

THE COMMONWEALTH OF MASSACHUSETTS
Executive Office of Labor
Department of Labor and Industries
Leverett Saltonstall Building, Government Center
100 Cambridge Street, Boston, 02202

[SEAL]

Office of the Commissioner
James F. Snow
(617) 727-3454

February 16, 1990

F. Lester Fraser, President
Fraser Engineering Co.
63 Court Street
Post Office Box 61
Newton, Massachusetts 02160

RE: Boston Harbor Project
Massachusetts Water Resources Authority

Dear Mr. Fraser:

I am writing in response to your letter dated September 21, 1989, protesting the decision of the MWRA to award bids only to contractors who agree to comply with the Project Labor Agreement for the Boston Harbor Project. It is the opinion of this Department that the MWRA acted properly, and that such a requirement is legal. Because of the importance of this issue, it is essential to answer your concerns in a thorough manner.

The Massachusetts Water Resources Authority (MWRA), under a mandate to clean up Boston harbor, established the Boston Harbor Project (Project). The MWRA hired Kaiser Engineers, Inc. (Kaiser) to be the

Program/Construction Manager on the Project. Kaiser negotiated a Project Labor Agreement (Agreement) with the Building and Construction Trades Council of the Metropolitan District, its affiliated local unions, and the Building and Construction Trades Department, AFL-CIO, which states that all contractors awarded a job under the Project will follow the Project Labor Agreement on the Project.

Article I sets forth the purpose of the Agreement, as follows:

> The Boston Harbor Project, an undertaking of the Massachusetts Water Resources Authority, is the largest public works project in the history of New England. The goal of the Project is to provide effective sewage disposal for the people of Massachusetts. Pursuant to an order issued by the United States District Court for the District of Massachusetts, the Authority has authorized the construction of new wastewater treatment facilities and related facilities to reduce pollution in the Boston Harbor. The Court has ordered that these facilities be completed within specified and limited time frames.
>
> The timely and successful completion of the Project is of vital importance to all the people of the Commonwealth of Massachusetts. Therefore, it is essential that the construction work be done in an efficient and economical manner in order to secure optimum productivity and to eliminate any delays in the work. In recognition of the special needs of this Project and to maintain a spirit of harmony, labor-management peace, and stability during the term of this Project Labor Agreement, the parties agree to establish effective and binding methods for the settlement of all misunderstandings, disputes or grievances which may arise. Therefore, the Unions agree not engage in any strike, slowdown or interruption of work and the Contractor agrees not to engage in any lockout.

The conditions for bidding and award of contract, as established in Article II, Section 2(a), provide that:

> The Authority, Project Contractor and/or Contractor, as appropriate, has the absolute right to select any qualified bidder for the award of contracts on this Project without reference to the existence or non-existence of any Agreements between such bidder and any party to this Agreement provided, however, only that such bidder is willing, ready and able to execute and comply with the Project Labor Agreement, should it be designated the successful bidder.

The Project is operating under the jurisdiction of U.S. District Court Judge A. David Mazzone, who held that wastewater discharges into Boston Harbor were in violation of the Federal Clean Water Act of 1972. He issued an order outlining a mandatory timetable for the completion of construction of primary and secondary wastewater treatment facilities. Every month the MWRA submits a report to Judge Mazzone demonstrating its compliance with his scheduling orders. Taxpayers of cities and towns serviced by the MWRA bear the majority of the costs of the construction. Kaiser estimated that these costs would increase by an estimated two million dollars per week with any delay in the construction schedule.

The geographical setting of the Project is particularly conducive to labor-related disputes which could cause delay. Access to the two construction sites, Deer Island and Nut Island, is by boat or by bus. With access to the work sites so limited, there is great potential for labor unrest to interfere with the construction. In fact, before the Agreement was adopted, the potential was already realized. On November 9, 1988, Pipefitters Local 537 and Sheet Metal Workers Local 17 set up pickets at the entrance to the work site on Deer Island. Since the work site was accessible by only one road, the picketing resulted

in a work stoppage. The construction schedule was not resumed until November 14 when the picketing ended.

In order to avoid this sort of disruption, among others, the Agreement provides several dispute resolution mechanisms. First, there is an expedited arbitration process for any violation of the no-strike clause in the Agreement. Additionally, there are provisions for the resolution of individual employee grievances. Finally, the Agreement establishes a procedure for settling jurisdictional disputes, whether inter-disciplinary or inter-trade. This procedure is essential for strife-free construction in the Boston area where the unions do not participate in the National Joint Board for the Settlement of Jurisdictional Disputes.

As the construction of wastewater treatment facilities, the Project falls under the public construction bid statutes. The two Massachusetts statutes which govern the award of public construction contracts are Massachusetts General Laws c. 30 § 39M and c. 149 §§ 44A-J. Both statutes require that the awarding authority award the bid to the lowest responsible and eligible bidder. § 44A defines these, as follows:

> "Responsible" means demonstrably possessing the skill, ability and integrity necesssary to faithfully perform the work called for by a particular contract, based upon a determination of competent workmanship and financial soundness in accordance with the provisions of section forty-four D of this chapter; "Eligible" means able to meet all requirements for bidders or offerors set forth in sections forty-four A through forty-four H of this chapter . . . and who shall certify that s/he is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed on the work.

Likewise, c. 30 § 39M(c) provides that:

> (t)he term "lowest responsible and eligible bidder" shall mean the bidder (1) whose bid is lowest of those

> bidders possessing the skill, ability and integrity necessary for the faithful performance of the work; (2) who shall certify that he is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed in the work . . . .

In addition, M.G.L. c. 30 § 39M(a) states that an "awarding authority may reject any and all bids, if it is in the public interest to do so." Likewise, M.G.L. c. 149 § 44E(1) provides that "the awarding authority shall reserve the right to reject any or all such general bids, if it be in the public interest to do so."

At their foundation, the Massachusetts bid laws establish a level playing field for bidders. *Builders Realty Corp. of Massachusetts v. City of Newton*, 201 N.E.2d 825 (Mass. 1964). "(T)he purpose of the competitive bidding statutes is not only to ensure that the awarding authority obtain the lowest price among responsible contractors, but also to establish an open and honest procedure for competition in public contracts." *Modern Continental Construction Co., Inc. v. City of Lowell*, 465 N.E.2d 1173, 1179 (1984). The bidding process must be as equitable as possible. "So long as bidders have an opportunity to bid in the same way, on the same information, and to bear the same risk of rejection, fairness and equality are preserved." *Department of Labor and Industries v. Boston Water and Sewer Commission*, 469 N.E.2d 64, 68 (1964).

Furthermore, M.G.L. c.149 § 44D permits the awarding authority to set the terms of the job specifications. Provided that its requirements are not illegal, unreasonable or in violation of the statutory scheme, the awarding authority may require that which goes beyond the statutory minimum. See, *e.g.*, *Gil-Bern v. City of Brockton*, 353 Mass. 503 (1968); *Builders Realty Corp. of Massachusetts v. City of Newton*, 348 Mass. 65 (1964). The Department recently upheld this proposition in a case decided September 11, 1989, *In Re: Wareham EDIC and*

the Protest of AGM Maritime Contractors, Inc., finding that a bidder must comply with certain minority participation requirements set forth in the specifications for the project. "(T)here is no question that the specifications issued by the Wareham EDIC made mandatory the submission of the schedule (for minority participation) for participation with the bid." *Id.* at 7.

There is no Massachusetts case directly on point on the issue of an awarding authority requiring the qualified bidder to agree to comply with a project labor agreement. However, the court in a related case construes the language in the statutes regarding labor harmony and the public interest. In *Modern Continental Construction Co., Inc. v. Massachusetts Port Authority*, 343 N.E.2d 362 (1976), the court held that the awarding authority may reject the lowest bidder if it determines that s/he cannot furnish labor able to work in harmony. The case involved a non-union construction firm, Modern Continental Construction Co., Inc. (Modern), which was the lowest bidder on a drainage project at Logan Airport. There were other construction projects ongoing at the Airport, including some projects nearby which employed members of Local 4 of the Operating Engineers. The business agent for that union advised the Authority that because Modern did not observe area standards for operating engineers, the local would publicize this fact by various means, including picketing. The Port Authority decided that because "there was a likelihood that the award of this contract to . . . Modern would result or give rise to a disruptive labor dispute," it would not award the bid to Modern and rejected all the bids. *Id.* at 363. In the next round of bids, Modern was not the lowest bidder and brought suit that it was entitled to the award or damages, in the alternative.

There are distinct similarities between the facts in *Modern Continental* and the Project. Each involves a geographical layout conducive to the quick spread of labor unrest. The court in *Modern Continental* found that

labor discord was a likely result of the proximity of workers from both the non-union drainage project and the nearby union construction projects, because there were only two gates through which all workers could enter the work sites. Similarly, one can imagine the entire Harbor Project disrupted by pickets placed at the entrance of the boats carrying the workers or the pick-up points for the buses. Another similarity concerns the evidence of the likelihood of labor disputes at the work site. In *Modern Continental* the court found that the letter from the business agent which stated the union's intention to publicly protest Modern's participation, combined with the Authority's subsequent deliberation on the matter, justified the Authority's rejection of the bids. How much more convincing than a potential threat was the actual work stoppage at the Deer Island site of the Boston Harbor Project, where the likelihood of a dispute was actualized, justifying the MWRA's establishment of a labor policy to avoid such disharmony.

While not dispositive, *Modern Continental* begins to illuminate the concept of labor harmony. First, the court held that the Authority, not the bidder, had the discretion to decide whether the bidder's labor could work in harmony. *Modern Continental* permits the awarding authority to decide if the bidder can furnish labor which will work in harmony, rather than having to rely on the bidder's own assertion. Second, the court said that the Authority did not act in an arbitrary or capricious manner, or in bad faith, where the Authority seriously and in a deliberate manner considered whether the business agent's letter was credible in presenting a probable labor dispute.

The MWRA has satisfied these threshold inquiries. Concerns about labor harmony had arisen from the start of the Project. The MWRA had already suffered one work stoppage, and was mandated to follow a federal court timeline which could be disrupted by further dis-

putes. Furthermore, without the help of the national jurisdictional board or an expedited arbitration process, the MWRA had no guarantee that for the next ten years there would be no other disputes, whether jurisdictional, interest or individual grievances. Faced with this possibility and determined to avoid labor unrest, the MWRA decided to fashion a labor policy which required a contractor to comply with terms preventing such unrest. This compliance would provide certification to the MWRA that the contractor could provide workers able to work in harmony with all other workers at the site.

As to the second issue, where the likelihood of labor discord was fulfilled, the MWRA cannot be said to have acted in an arbitrary or capricious manner, or in bad faith, in developing a labor policy to avoid such discord in the future. It is mandated to protect the interest of the public in having a major construction job performed in a timely and economical manner.

Since the labor harmony language does have substance, i.e., the awarding authority may consider whether in its opinion the workers of a contractor are able to work in harmony with others employed on the work site, it remains to consider the scope of its application.

Modern Continental does not define the scope of the labor harmony language, but does illuminate part of its application. That case "clearly contemplates a situation in which the union and non-union workers work in some type of proximity to one another." *Id.* at 364. However, the court did not address other situations contemplated by the language. The term "labor harmony" is a broad one, and not on its face applicable only to one kind of labor dispute. There are other types of labor unrest that could delay a project: an interest strike by a union during contract negotiation; a jurisdictional dispute between two unions over a work classification; or a strike over a grievance about working conditions.

The MWRA developed its policy in light of potential labor disputes not only between union and non-union, but also to avoid interest and jurisdictional strikes common in the industry. During the ten years of construction work on the Project collective bargaining agreements between unions and management will have to be negotiated several times. An interest strike at contract negotiation time is not unlikely; indeed, the potential for unrest is much more likely then. The MWRA could face several interest strikes over the course of the ten year Project. In addition, the potential for jurisdictional strikes is immense with the large number of unions participating in the Agreement. When all this is viewed through the prism of the particular geographical setting of the Project and the urgency of the federal court deadline, the requirement that a bidder comply with the Agreement seems prudent in protecting the public's interest in a timely-completed construction.

Without the Agreement, any of the various kinds of labor unrest would undercut a contractor's self-serving certification that s/he "is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed on the work." M.G.L. c. 149 § 44A. The Agreement constitutes the authority's standard for a contractor's certification that labor disputes will not occur on the work site. The certification comes from the workers themselves who agree, through the Agreement, not to strike. No such guarantee of labor harmony, contractual or otherwise, exists when the entire work force is non-union. However, although a contractor using solely non-union labor cannot guarantee that his or her workers are able to work in harmony with all others on the site, no such contractor will ever say that his or her workers cannot work in harmony with others. To permit the contractor to assert this ability on the part of his or her workers without more of a guarantee would render the labor harmony language meaningless. The holding in *Modern Continental*, requiring the awarding

authority to decide who can work in harmony in awarding the bid, thus reflects the reality of the workplace.

The case before us is one where the public interest must be balanced with individual right. There are several safeguards of the right of a contractor with a solely non-union work force. For example, there is no requirement that any job other than the Project be done with union workers, and no requirement that the contractor sign off on a collective bargaining agreement with a union. On the other hand, the public has an interest in the construction of its public structures in an efficient, productive manner where costs to its citizens are controlled. Where the means to achieve that goal are reasonable, as they are here with the Project Labor Agreement, the results cannot be viewed as discriminatory. This is particularly true when combined with a recognition of the rights of the individual. The interest of the public in having the work done on time, without any labor disruption delaying the work and increasing the costs outweighs any individual's right to a contract on his/her own terms. . .

It is argued that *Modern Continental* is dispositive because of dicta prohibiting restrictions to union firms in bidding. But the extent of the dicta was that bidding can not be restricted to unionized firms only, because that denies an equal opportunity to contract. See *Master Printers Association v. Trustees of Jr. College District No. 508*, 356 F.Supp. 1355 (N.D.Ill.1973). Such is not the case here. The bidding was not restricted to contractors with a union work force. The MWRA required that the lowest responsible and eligible bidder, whether union or non-union, must agree to comply with the Agreement. Article III of the Agreement provides that the contractor must agree to use the local union's job referral system for labor on the Project, or to give preference to applicants referred by the local union where the union has no such referral system. Article III further states

that the job referral system must be operated in a non-discriminatory manner. This comports with case law construing a provision in the National Labor Relations Act, 29 U.S.C. § 158(f) (1974), which requires that a union hiring hall refer applicants to a contractor regardless of their membership in the union. See *e.g.*, *Laborers International Union of North America v. Kunco, Inc.*, 472 F.2d 456 (8th Cir. 1973); *Associated General Contractors of North Dakota v. Otter Tail Power Co. and Bechtel*, 457 F.Supp. 1207 (D.N.D. 1978), aff'd, 611 F.2d 684 (1979).

Although the Agreement provides that candidates for jobs will be referred by the union to the contractor, a union work force was not a prerequisite to bidding on the Project. Under such a scheme, all firms, union and non-union, would have had to sign labor agreements with unions which would have been binding on them for the life of the agreement, and for all jobs, public or private, undertaken by the contractor, whether or not they were awarded the bid for the Project. Besides being illegal, this would be highly impractical and inefficient. On the contrary, the MWRA required that the bidder who was awarded the job comply with the Project Labor Agreement, agreeing to use labor supplied through the local union's job referral system only for the life of the Boston Harbor Project.

Finally, the Agreement diminishes the possibility that the MWRA will face the problems and costs of re-bidding due to labor unrest, as in *Modern Continental*. Since any bidder who wishes to be awarded a job with the Project must comply with the Agreement, the MWRA is assured that whomever it chooses as the lowest eligibile and responsible bidder for each contract awarded under the Agreement will not contravene the labor harmony language of the statute. This permits the MWRA to proceed expeditiously with the Project without having to choose between labor discord or prolonged re-bidding, saving the general public money and time.

The public bid statutes give an awarding authority the discretion to reject any and/or all bids, if it is in the public interest to do so. Although there is no case law on the issue of rejecting the lowest bidder for not furnishing labor able to work in harmony and selecting the next lowest bidder who can, in *Modern Continental* the court held the awarding authority justified under the labor harmony clause in rejecting the low bidder and re-bidding the project.

The result in *Modern Continental, i.e.*, re-bidding the project upon the finding of a credible threat to labor harmony, potentially poses for awarding authorities without such a Project Labor Agreement the prospect of delays in the commencement of the project and increased costs associated with re-bidding and inflation. This is especially true for a job of the magnitude of the Project where there are one hundred (100) contracts under the Agreement. For the MWRA to have to re-bid each time labor harmony was threatened, as in *Modern Continental*, would ". . . thwart one of the fundamental purposes of public bidding: to enable an awarding authority to obtain the lowest price for its work which competition among responsible contractors can secure, and to assure qualified bidders of equal treatment if they submit bids." *Wareham EDIC, supra* at 8,9.

Without language similar to that in the Agreement, delays due to questions of labor harmony could repeat indefinitely, thus confronting the awarding authority with a Hobson's choice of additional costs associated with repeated re-bidding or additional costs associated with the delays occasioned by a prolonged strike. Such a result is both illogical and contrary to the public interest in the competent, expeditious construction of public works at the lowest price by a qualified contractor.

In summary, the awarding authority in the Boston Harbor Project did not violate the Commonwealth's competitive bidding statutes when it required the lowest re-

sponsible and eligible bidder to agree to follow the Project Labor Agreement. Accordingly, your protest is denied.

Very truly yours,

/s/ James F. Snow
JAMES F. SNOW
Commissioner

cc: Catherine Farrell, Esq.
Massachusetts Water Resources Authority

William J. Curtin, Esq.
Morgan, Lewis & Bockius

APPENDIX I

BOSTON HARBOR WASTEWATER TREATMENT FACILITIES PROJECT LABOR AGREEMENT

BY AND BETWEEN

KAISER ENGINEERS, INC., ON BEHALF OF THE MASSACHUSETTS WATER RESOURCES AUTHORITY,

AND THE

THE BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT AND ITS AFFILIATED LOCAL UNIONS AND LOCAL 52, BRICKLAYERS, LOCAL 424, CARPENTERS, LOCAL 133, LABORERS,

AND THE

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO AND ITS AFFILIATED INTERNATIONAL UNIONS AND THEIR AFFILIATED LOCAL UNIONS

Effective May 22, 1989

NOTE: Schedule A's and Schedule B's are not attached to this Agreement, although they are incorporated herein by reference as if fully set forth. Copies of Schedule A's and Schedule B's may be examined at the address specified in the Advertisement for Bids where Documents may be obtained and are available upon request. Note that Schedule B's are applicable and available for Projects including tunnelwork only.

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BOSTON HARBOR WASTEWATER TREATMENT FACILITIES PROJECT LABOR AGREEMENT

AGREEMENT

This Project Labor Agreement (hereinafter, the "Agreement") is entered into this 22nd day of May 1989, by and between Kaiser Engineers, Inc. (hereinafter, the "Project Contractor"), its successors or assigns, and the Building and Construction Trades Department, AFL-CIO (hereinafter, the "Department"), on behalf of its affiliated International Unions and their Local Unions, and the Building and Construction Trades Council of the Metropolitan District on behalf of its affiliated Local Unions, and Local 52, Bricklayers; Local 424, Carpenters; and Local 133, Laborers, each acting in its own behalf and on behalf of its respective affiliates and members (hereinafter, collectively called the "Union" or "Unions"), with respect to the construction of the wastewater treatment facilities and related facilities in Suffolk and Norfolk Counties, Massachusetts, known as the "Boston Harbor Project".

It is understood by the parties to this Agreement that it is the policy of the Massachusetts Water Resources Authority (hereinafter, the "Authority") that the construction work covered by this Agreement shall be contracted to Contractors who agree to execute and be bound by the terms of this Agreement. Therefore, the Unions agree that other Contractors may execute the Agreement for the purpose of covering that work. The Project Contractor shall monitor compliance with this Agreement by all Contractors who through their execution of this Agreement, together with their subcontractors, have become bound hereto.

The term "Contractor" shall include all Contractors and subcontractors of whatever tier engaged in on-site construction work within the scope of this Agreement, including Kaiser Engineers, Inc. when it performs construction work within the scope of this Agreement. Where

specific reference to Kaiser Engineers, Inc. alone is intended, the term "Project Contractor" is used.

The Union and the Project Contractor and all signatory Contractors agree to abide by the terms and conditions contained in this Agreement with respect to the administration of the Agreement by the Project Contractor and the performance of the construction by the Contractor of the Project. This Agreement represents the complete understanding of the parties, and it is further understood that no Contractor party is required to sign any other agreement as a condition of performing work within the scope of this Agreement. No practice, understanding or agreement between a Contractor and a Union party which is not explicitly set forth in this Agreement shall be binding on any other party unless endorsed in writing by the Project Contractor.

ARTICLE I

PURPOSE

The Boston Harbor Project, an undertaking of the Massachusetts Water Resources Authority, is the largest public works project in the history of New England. The goal of the Project is to provide effective sewage disposal for the people of Massachusetts. Pursuant to an order issued by the United States District Court for the District of Massachusetts, the Authority has authorized the construction of new wastewater treatment facilities and related facilities to reduce pollution in the Boston Harbor. The Court has ordered that these facilities be completed within specified and limited time frames.

The timely and successful completion of the Project is of vital importance to all the people of the Commonwealth of Massachusetts. Therefore, it is essential that the construction work be done in an efficient and economical manner in order to secure optimum productivity and to eliminate any delays in the work. In recognition of the

special needs of this Project and to maintain a spirit of harmony, labor-management peace, and stability during the terms of this Project Labor Agreement, the parties agree to establish effective and binding methods for the settlement of all misunderstandings, disputes or grievances which may arise. Therefore, the Unions agree not to engage in any strike, slowdown or interruption of work and the Contractor agrees not to engage in any lockout.

ARTICLE II

SCOPE OF THE AGREEMENT

Section 1. This Agreement, hereinafter designated as the "Project Labor Agreement" or "Agreement," shall apply and is limited to all construction work (including pre-operational testing, check-out and startup) under the direction of the signatory Contractors and performed by those Contractor(s) of whatever tier which have contracts awarded for such work on and after the effective date of this Agreement, which may include the Project Contractor, for the Authority, with regard to the wastewater treatment facilities being developed in and around Boston Harbor by the Authority and herein called the "Project".

Such Project is generally described as the construction of:

(1) primary, secondary and residual wastewater treatment facilities on Deer Island (located in Boston Harbor);

(2) head works on Nut Island;

(3) a tunnel under Boston Harbor from Nut Island to Deer Island;

(4) an outflow eastward into the Atlantic Ocean from Deer Island, including the installation of diffusers;

(5) related facilities which include, as necessary,

(a) site preparation, demolition and/or rehabilitation of facilities now located on the site;

(b) designated materials and personnel loading and unloading and staging sites dedicated to the Project;

(c) transportation systems in and around the Harbor for personnel and materials; and

(d) installation of utilities necessary for the operation of the Authority's Deer Island facilities, not otherwise undertaken by public or private utility organizations, in the town of Winthrop;

(6) the interim and permanent sludge treatment plants at FRSA; and

(7) new construction/rehabilitation work for the Authority's current operating facilities on Deer Island and Nut Island awarded after the effective date of this Agreement.

Section 2(a). The Authority, Project Contractor, and/or Contractor, as appropriate, has the absolute right to select any qualified bidder for the award of contracts on this Project without reference to the existence or non-existence of any Agreements between such bidder and any party to this Agreement provided, however, only that such bidder is willing, ready and able to execute and comply with the Project Labor Agreement, should it be designated the successful bidder.

(b). It is agreed that all direct subcontractors of a Contractor, of whatever tier, who have been awarded contracts for work covered by this Agreement on or after the effective date of this Agreement shall be required to accept and be bound by the terms and conditions of this Project Labor Agreement.

Section 3(a). The provisions of this Project Labor Agreement (including the attached Schedule A's which are the Local Collective Bargaining Agreements and the attached Schedule B's which are the local Collective Bargaining Agreements covering tunnels of Local 4, OE; Local 88, LIUNA; and Local 103, IBEW, which have jurisdiction over tunnel work) shall apply to the construction of the Project, notwithstanding the provisions of Local, Area, and/or National Agreements which may conflict or differ from the terms of this Agreement. Where a subject covered by the provisions of this Project Labor Agreement is also covered by the Collective Bargaining Agreement which serves as the basis for the attached Schedule A or B, the provisions of this Project Labor Agreement shall prevail. Where a subject is covered by the provisions of Schedule A and not covered by the Project Labor Agreement, the Schedule A provisions shall prevail.

(b) Any dispute as to the applicable source, between this Agreement and a Schedule A or B, for determining the wages, hours and working conditions of employees on the Project shall be resolved by [*same as Article II, Section 9*]. It is understood that this Agreement, together with the referenced Schedule A's and B's, constitutes a self-contained, stand alone, Agreement and that by virtue of having become bound to this Project Labor Agreement, the Contractor will not be obligated to sign any other Local, Area or National Agreement.

Section 4. This Agreement shall only be binding on the signatory parties hereto and shall not apply to the parents, affiliates, subsidiaries, or other ventures of any such party.

Section 5. This Agreement shall be limited to work historically recognized as construction work, including, specifically, the site preparation and related demolition work necessary to prepare the site for construction, and such rehabilitation of existing facilities as is directed by

the Authority. Nothing contained herein shall be construed to prohibit, restrict, or interfere with the performance of any other operation, work or function which may occur in or around the Project site or be associated with the development of the Project, or with the ongoing operations of the Massachusetts Water Resources Authority.

Section 6. Items specifically excluded from the scope of this Agreement include, but are not limited to, the following:

A. Work of non-manual employees, including but not limited to, superintendents, supervisors, staff engineers, surveyors (except where expressly covered by a current local Collective Bargaining Agreement which forms the basis for a Schedule A or B), inspectors, quality control personnel, quality assurance personnel, timekeepers, mail carriers, clerks, office workers, including messengers, guards, emergency medical and first aid technicians, and other professional, engineering, administrative, supervisory and management employees.

B. Equipment and machinery owned or controlled and operated by the Authority.

C. All off-site handling of materials, equipment or machinery and all deliveries to and from the Project site.

D. All employees of the Authority, and all employees of the Project Contractor or the Contractor not performing manual labor.

E. Any work performed on or near, or leading to or into, the Project site by state, county, city or other governmental bodies, or their Contractors; or by public utilities or their Contractors; and/or by the Authority, or its Contractors (for work which is not part of the Project).

F. Off-site maintenance on leased equipment and on-site supervision of such work.

G. Off-site warranty functions and warranty work, and on-site supervision of such work.

H. Exploratory geophysical testing and boring both on-land and off-shore, except where expressly covered by a current Collective Bargaining Agreement which forms the basis for a Schedule A or B.

I. Laboratory or specialty testing or inspections not ordinarily done by the crafts.

Section 7. None of the provisions of this Project Labor Agreement shall apply to the Massachusetts Water Resources Authority and nothing contained herein shall be construed to prohibit or restrict the Authority or its employees from performing work not covered by this Agreement on the Project site. As areas and systems of the Project are inspected and construction tested by the Project Contractor or Contractor and accepted by the Authority, the Agreement shall not have further force or effect on such items or areas, except when the Project Contractor or Contractor are directed by the Authority to engage in repairs, modifications, check-out, and/or warranty functions required by their contract(s) with the Authority.

Section 8. It is understood that the Authority, at its sole option, may terminate, delay and/or suspend any or all portions of the Project at any time.

Section 9. It is understood that the Project is under the continuing supervision of the United States District Court for the District of Massachusetts, and the parties recognize that adjustments in construction planning, processes, procedures, timing, or in the provisions of this Agreement may be necessitated by orders of the Court. To the extent that there are changes ordered by the Court which are, or appear to be, in conflict with this

Agreement, the parties will use their best efforts to resolve these issues, to the extent necessary with the assistance of the Court, but should they be unable to resolve the matter, the dispute or differences shall be referred to ————————, who shall hear and resolve the matter in a manner consistent with the orders of the Court and to the extent possible in the best interest of all parties involved, including specifically the Authority, the citizens of Massachusetts whom the Authority serves, and the Union and the employees it represents on the Project.

Section 10. It is understood that the liability of any Contractor and the liability of the separate Unions under this Agreement shall be several and not joint. The Unions agree that this Agreement does not have the effect of creating any joint employment status between or among the Authority, Project Contractor and/or any Contractor.

ARTICLE III

UNION RECOGNITION AND EMPLOYMENT

Section 1. The Contractor recognizes the Union as the sole and exclusive bargaining representative of all craft employees working on facilities within the scope of this Agreement.

Section 2. Applicants for various classifications covered by the Agreement required by the Contractor on the Project shall be referred to the Contractor by the Local Union. The Contractor shall have the right to determine the competency of all employees, the right to determine the number of employees required and shall have the sole responsibility for selecting the employees to be laid-off consistent with Article IV, Section 3 below. The Contractor shall also have the right to reject any applicant referred by the Local Union, subject to the show-up payments required in the applicable Schedule A or B.

Section 3. For a Local Union now having a job referral system in its Local Collective Bargaining Agree-

ment, for the purpose of initial employment only, the Contractor agrees to include such system in the appropriate Schedule A or B and it shall be used exclusively by the Contractor. Such job referral system must be operated in a non-discriminatory manner and in full compliance with Federal, state and local laws and regulations which require equal employment opportunities and non-discrimination, and referrals shall not be affected in any way by the rules, regulations, by-laws, constitutional provisions or any other aspects or obligations of union membership, policies or requirements and shall be subject to such other conditions as established in this Article.

Section 4. All employees covered by this Agreement shall be subject to the union security provisions contained in the applicable Schedule A's and B's.

Section 5. In the event that any Union is unable to fill any requisition for employees within a forty-eight (48) hour period after such requisition is made by the Contractor (Saturdays, Sundays and Holidays excepted) the Contractor may employ applicants from any other available source.

Section 6. In the event that the Local Union does not have a job referral system as set forth in Section 3 of this Article, the Contractor shall give the Local Union first preference to refer applicants, subject to the provisions of Section 5. The Contractor shall notify the Union of employees hired by any source other than referral by the Union.

Section 7. The Local Union shall not knowingly refer to a Contractor under this Agreement employees currently employed by another Contractor working under this Agreement.

Section 8. The Local Unions will exert their utmost efforts to recruit sufficient numbers of skilled craftsmen to fulfill the manpower requirements of the Contractor.

Section 9. The selection of craft foremen and/or general foremen and the number of foremen required shall be entirely the responsibility of the Contractor. It is understood that the procedure for selection of such foremen and/or general foremen may be affected by specific provisions of applicable Schedule A's or B's; and, further, that the contractor shall give primary consideration to qualified individuals within the jurisdiction of the Local Union (limited, where required by existing local Collective Bargaining Agreements, to those passing a required test). After giving such consideration, the Contractor may select such individuals from other geographic jurisdictions. All foremen shall take orders exclusively from the designated Contractor representatives. Craft foremen shall be designated as working foremen at the request of the Contractor, except when an existing local Collective Bargaining Agreement prohibits a foreman from working when the craftsmen he is leading exceed a specified number.

Section 10. Except as provided in Article IV, Section 3, individual seniority shall not be recognized or applied to employees working on the Project.

ARTICLE IV

UNION REPRESENTATION

Section 1. Authorized representatives of the Union shall have access to the Project, provided they do not interfere with the work of employees and further provided that such representatives fully comply with the posted visitor and security and safety rules of the Project.

Section 2. Stewards

(a) Each signatory Local Union shall have the right to designate a working journeyman as a steward, and shall notify the Contractor in writing of the identity of the designated steward prior to the assumption of his duties as steward. Such designated steward shall not exercise

any supervisory functions. There will be no non-working stewards. Stewards will receive the regular rate of pay of their respective crafts.

(b) In addition to his work as an employee, the steward shall have the right to receive, but not solicit, complaints or grievances and to discuss and assist in the adjustment of the same with the employee's appropriate supervisor. Each steward shall be concerned with the employees of the steward's contractor and, if applicable, subcontractors, and not with the employees of any other contractor. The Contractor will not discriminate against the steward in the proper performance of his Union duties.

(c) The stewards shall not have the right to determine when overtime shall be worked or who shall work overtime, except on the basis of a Schedule A or B which contains a procedure for establishing equitable distribution of overtime.

Section 3. The Contractor agrees to notify the appropriate Union twenty-four (24) hours prior to the layoff of a steward, except in the case of discipline or discharge for just cause. If a steward is protected against such layoff by the provisions of any Schedule A or B, such provisions shall be recognized to the extent that the steward possesses the necessary qualifications to perform the work remaining. In any case in which a steward is discharged or disciplined for just cause, the appropriate Union shall be notified immediately by the Contractor.

Section 4. On work where the Authority's personnel may be working in close proximity of the construction activities, the Union agrees that the Union representatives, stewards and individual workers will not interfere with the Authority's personnel or with the work which is being performed by the Authority's personnel.

ARTICLE V

MANAGEMENT'S RIGHTS

Section 1. The Contractor retains full and exclusive authority for the management of its operation. Except as expressly limited by other provisions of this Agreement, the Contractor retains the right to direct the workforce, including the hiring, promotion, transfer, lay-off, discipline or discharge for just cause of its employees; the selection of foremen; the assignment and schedule of work; the promulgation of reasonable work rules; and, the requirement of overtime work, the determination of when it shall be worked, and the number and identity of employees engaged for such work. No rules, customs, or practices which limit or restrict productivity, efficiency or the individual and/or joint working efforts of employees shall be permitted or observed. The Contractor may utilize any methods or techniques of construction.

Section 2. Except as otherwise expressly stated in this Agreement, there shall be no limitation or restriction upon the Contractor's choice of materials or design, nor, regardless of source or location, upon the full use and installation of equipment, machinery, package units, precast, pre-fabricated, pre-finished, or preassembled materials, tools, or other labor-saving devices. The Contractor may without restriction install or otherwise use materials, supplies or equipment regardless of their source according to the Schedule A's and B's or as customarily performed in this area. The on-site installation or application of such items shall be performed by the craft having jurisdiction over such work; provided, however, it is recognized that other personnel having special talents or qualifications may participate in the installation, check-off or testing of specialized or unusual equipment or facilities.

Section 3. Except as otherwise expressly stated in this Agreement, it is recognized that the use of new technol-

ogy, equipment, machinery, tools and/or labor-saving devices and methods of performing work will be initiated by the Contractor from time to time during the Project. The Union agrees that it will not in any way restrict the implementation of such new devices or work methods. If there is any disagreement between the Contractor and the Union concerning the manner or implementation of such device or method of work, the implementation shall proceed as directed by the Contractor, and the Union shall have the right to grieve and/or arbitrate the dispute as set forth in Article VII of this Agreement.

ARTICLE VI

WORK STOPPAGES AND LOCKOUTS

Section 1. There shall be no strike, picketing, work stoppages, slowdowns or other disruptive activity for any reason by the Union or employees against any Contractor covered under this Agreement, and there shall be no lockout by the Contractor. Failure of any Union or employee to cross any picket line established by any union, signatory or non-signatory, or any other organization, at or in proximity to the Project site is a violation of this Article.

Section 2. The Contractor may discharge any employee violating Section 1 above, and any such employee will not be eligible for referral under this Agreement for a period of ninety (90) working days from the date of his discharge. The Contractor and the Union shall take all steps necessary to obtain compliance with this Article and neither shall be held liable for conduct for which it is not responsible.

Section 3. If the Contractor contends that any Union has violated this Article, it will telegraph the International President(s) of the Local Union(s) involved advising him of the fact, with copies of such telegram to the President of the Local Union(s) involved, the Building Trades Council and the Department. The International

President or Presidents will immediately instruct, order and use the best efforts of his office to cause the Local Union or Unions to cease any violation of this Article. An International Union complying with this obligation shall not be liable for unauthorized acts of its Local Union.

Section 4. Any party, including the Project Contractor, may institute the following procedure, in lieu of or in addition to any other action at law or equity, when a breach of Section 1, above, is alleged:

a. A party invoking this procedure shall notify ———, whom the parties agree shall be the permanent arbitrator under this procedure. In the event that the permanent arbitrator is unavailable at any time, he shall appoint his alternate. Notice to the arbitrator shall be by the most expeditious means available, with notices by telegram to the party alleged to be in violation and to the Department and the Council if it is a Union alleged to be in violation.

b. Upon receipt of said notice, the arbitrator named above or his alternate shall sit and hold a hearing within twenty-four (24) hours if it is contended that the violation still exists, but not before twenty-four (24) hours after the telegraph notice to the International President(s) required by Section 3, above.

c. The arbitrator shall notify the parties by telegram of the place and time he has chosen for this hearing. Said hearing shall be completed in one session, which, with appropriate recesses at the arbitrator's discretion, shall not exceed 24 hours unless otherwise agreed upon by all parties. A failure of any party or parties to attend said hearings shall not delay the hearing of evidence or the issuance of any award by the arbitrator.

d. The sole issue at the hearing shall be whether or not a violation of Section 1, above, has in fact occurred, and the arbitrator shall have no authority to consider any matter in justification, explanation or mitigation of such violation or to award damages, which issue is reserved for court proceedings, if any. The Award shall be issued in writing within three (3) hours after the close of the hearing, and may be issued without an Opinion. If any party desires an Opinion, one shall be issued within fifteen (15) days, but its issuance shall not delay compliance with, or enforcement of, the Award. The arbitrator may order cessation of the violation of this Article and other appropriate relief, and such Award shall be served on all parties by hand or registered mail upon issuance.

e. Such Award may be enforced by any Court of competent jurisdiction upon the filing of this Agreement and all other relevant documents referred to hereinabove in the following manner. Telegraphic notice of the filing of such enforcement proceedings shall be given to the other party. In the proceeding to obtain a temporary order enforcing the arbitrator's Award as issued under Section 4(d) of this Article, all parties waive the right to a hearing and agree that such proceedings may be *ex parte*. Such Agreement does not waive any party's right to participate in a hearing for a final order of enforcement. The Court's order or orders enforcing the arbitrator's award shall be served on all parties by hand or by delivery to their last known address or by registered mail.

f. Any rights created by statute or law governing arbitration proceedings inconsistent with the above procedure or which interfere with compliance hereto are hereby waived by the parties to whom they accrue.

g. The fees and expenses of the arbitrator shall be equally divided between the moving party or parties and the party or parties respondent.

Section 5. Procedures contained in Article VII shall not be applicable to any alleged violation of this Article, with the single exception that any employee discharged for violation of Section 1, above, may resort to the procedures of Article VII to determine only if he was, in fact, engaged in that violation.

ARTICLE VII

DISPUTES AND GRIEVANCES

Section 1. This Agreement is intended to provide close cooperation between management and labor. The Project Contractor and The Building and Construction Trades Department and the Building and Construction Trades Council of the Metropolitan District shall each assign a representative to this Project for the purpose of assisting the International and Local Unions, together with the Contractor, to complete the construction of the Project economically, efficiently, continuously and without interruption, delays or work stoppages.

Section 2. The Contractor, Unions, and employees collectively and individually, realize the importance to all parties to maintain continuous and uninterrupted performance of the work of the Project, and agree to resolve disputes in accordance with the arbitration provisions set forth in this Article.

Section 3. Any question arising out of and during the term of this Agreement involving its interpretation and application (other than trade jurisdictional disputes or alleged violations of Article VI, Section 1) shall be considered a grievance and subject to resolution under the following procedures:

Step 1(a). When any employee subject to the provisions of this Agreement feels he is aggrieved by a

violation of this Agreement, he shall, through his Local Union business representative or job steward, within five (5) working days after the occurrence of the Violation, give notice to the work site representative of the involved Contractor stating the provision(s) alleged to have been violated. The business representative of the Local Union or the job steward and the work site representative of the involved Contractor shall meet and endeavor to adjust the matter within three (3) working days after timely notice has been given. If they fail to resolve the matter within the prescribed period, the grieving party, may, within forty-eight (48) hours thereafter, pursue Step 2 of the grievance procedure provided the grievance is reduced to writing, setting forth the relevant information concerning the alleged grievance, including a short description thereof, the date on which the grievance occurred, and the provision(s) of the Agreement alleged to have been violated. Grievances and disputes settled at Step 1 shall be non-precedential except as to the parties directly involved unless endorsed by the Project Contractor within five (5) days after resolution has been reached and the terms of the resolution are set forth in writing to the Project Contractor.

(b) Should the Local Union(s) or Project Contractor or any other Contractor have a dispute with the other party and, if after conferring, a settlement is not reached within three (3) working days, the dispute shall be reduced to writing and proceed to Step 2 in the same manner as outlined herein for the adjustment of an employee complaint.

Step 2. The Business Manager or his designee of the involved Local Union, together with the International Union representative of that Union, the site representative of the involved Contractor, and the labor relations representative of the Project Contrac-

tor shall meet within seven (7) working days of the referral of the dispute to this second step to arrive at a satisfactory settlement thereof. If the parties fail to reach an agreement, the dispute may be appealed in writing in accordance with the provisions of Step 3 within fourteenth (14) calendar days after the initial meeting at Step 2.

Step 3(a). If the grievance shall have been submitted but not adjusted under Step 2, either party may request, in writing, within fourteen (14) calendar days after the initial Step 2 meeting, that the grievance be submitted to an arbitrator selected from the panel pre-selected by the parties to this Agreement, or if the membership of a panel has yet to be agreed upon, by mutual agreement of the parties, but if they are unable to do so within fourteen (14) days after referral to them for arbitration, they shall request the American Arbitration Association to provide them with a list of arbitrators from which the arbitrator shall be selected. The rules of the American Arbitration Association shall govern the conduct of the arbitration hearing. The decision of the arbitrator shall be final and binding on all parties and the fee and expenses of such arbitrations shall be borne equally by the involved Contractor and the involved Union(s).

(b) Failure of the grieving party to adhere to the time limits established herein shall render the grievance null and void. The time limits established herein may be extended only by written consent of the parties involved at the particular step where the extension is agreed upon. The arbitrator shall have the authority to make decisions only on issues presented to him and he shall not have the authority to change, amend, add to or detract from any of the provisions of this Agreement.

Section 4. No adjustment or decision may provide retroactivity exceeding sixty (60) days prior to the date of the filing of a written grievance.

Section 5. The Project Contractor shall be notified by the involved contractor of all actions at Steps 2 and 3 and shall, upon its request, be permitted to participate in full in all proceedings at these steps.

ARTICLE VIII

JURISDICTIONAL DISPUTES

Section 1. There will be no strikes, work stoppages, slowdowns, or other disruptive activity arising out of any jurisdictional dispute. Pending the resolution of the dispute, the work shall continue uninterrupted as assigned by the Contractor.

Section 2(a). Building construction work shall be assigned by the Contractor in accordance with the procedural rules of the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (hereinafter the "Plan").

(b). It is recognized by the parties that certain portions of the construction work covered by this Agreement (for example, tunnel, off-shore drilling, etc.) will not fall within the traditional definition of "building construction work" and shall be assigned by the Contractor in a manner consistent with the jurisdictional agreements, rules and practices applicable in the discipline involved.

Section 3. Any jurisdictional dispute over the Contractor's assignment of work shall be settled in accordance with one of the following procedures:

(a). Where all of the disputing parties involved are stipulated to the procedures of the Plan for Settlement of Jurisdictional Disputes in the Construction Industry for disputes involving the building construction discipline, the dispute will be settled in accordance with the procedural

rules and decisions of that Plan and shall be binding upon the Contractor, except in such cases where all parties to the dispute are parties to a local plan recognized and approved by the Department in which event the dispute will be resolved in accordance with the procedures of that plan.

(b). Where all the disputing parties involved are stipulated to an agreed-upon method, approved by the Department, for resolving disputes in a discipline other than building construction work, a dispute involving work assigned under that discipline shall be resolved in accordance with the procedures of that agreed-upon method.

(c)(1). Where all parties are not bound to the same dispute resolution procedure, or where the dispute includes a difference among the parties over the appropriate body with jurisdiction to decide such dispute or in any other situation not covered in paragraph (a) or (b) of this Section, and if the dispute is not resolved among the parties within seven (7) days, it shall be referred by any one of the Unions or the involved Contractor, within five (5) days thereafter, to the International Unions with which the disputing Unions are affiliated. The International Unions and the involved Contractor shall meet promptly to resolve the dispute. Any resolution shall be reduced to writing and signed by representatives of the involved Contractor and the International Unions.

(c)(2). In the event that the respective International Unions of the disputing Locals and the involved Contractor are unable to resolve the dispute within thirty (30) days from the date of referral, the dispute shall be referred by any of the interested parties to ———— (or some other agreed upon neutral), who the parties agree shall be the permanent arbitrator under this Article to hear and decide issues arising from the work assignment which is the basis for the dispute. The parties agree that the said arbitrator shall, within twenty (20) days of such referral, conduct a hearing and render a determination

of the dispute. The fee and expenses of such hearing shall be shared equally by each Union and the involved Contractor.

(c)(3). In such hearing, the arbitrator shall first determine whether the work in dispute is covered by the appropriate discipline within which the work falls for purposes of jurisdictional assignment and whether there exists an agreed-upon method for the resolution of jurisdictional disputes in that discipline to which all parties to the dispute are bound. If the arbitrator determines an agreed-upon method exists to which all parties are bound, he shall refer the dispute to that procedure for resolution. In all other cases, the arbitrator shall proceed to resolve the dispute on the merits.

Section 4. Any award or resolution made pursuant to Section 3 shall be final and binding on the disputing Unions and the involved Contractor on this Project only, and may be enforced in any court of competent jurisdiction. Such award or resolution shall not establish a precedent on other construction work not covered by this Agreement. In all disputes under this Article, the Project Contractor shall be considered a party in interest.

Section 5. In making any determinations hereunder, there shall be no authority to assign work to a double crew, that is, to more employees than the minimum required to perform the work involved; nor to assign the work to employees who are not qualified to perform the work involved. This does not prohibit the establishment, with the agreement of the involved Contractor, of composite crews where more than one (1) employee is needed for the job. The aforesaid determinations shall decide only to whom the disputed work belongs.

Section 6. There shall be no work stoppage or interruption while any jurisdictional dispute is being resolved. The work shall proceed as assigned by the Contractor until finally resolved under the applicable procedure of

this Article. The award or resolution shall be confirmed in writing to the involved parties. There shall be no strike, work stoppage or interruption in protest of any such award or resolution.

ARTICLE IX

WAGES AND BENEFITS

Section 1. All employees covered by this Agreement shall be classified in accordance with work performed and paid the base hourly wage rates for those classifications as specified in the attached Schedule A's and B's. Recognizing, however, that special conditions may exist or occur on the Project, the parties, by mutual agreement may establish rates for one or more classifications which may differ from the Schedule A's. Parties to such agreements shall be the Project Contractor, the Department, the involved Local Union(s) and the involved International Union(s).

Section 2. The Contractor agrees to pay contributions to the established employee benefit funds in the amounts designated in the appropriate Schedule A; provided, however, that the Contractor and the Union agree that only such bona fide employee benefits as accrue to the direct benefit of the employee (such as pension and annuity, health and welfare, vacation, apprenticeship and training funds, etc.) shall be included in this requirement and paid by the Contractor on this Project. Bona fide jointly trusteed fringe benefit plans established or negotiated through collective bargaining during the life of this Agreement may be added.

The Contractor adopts and agrees to be bound by the written terms of the legally-established Trust Agreements specifying the detailed basis on which payments are to be made into, and benefits paid out of, such Trust Funds. The Contractor authorizes the parties to such Trust Agreements to appoint trustees and successor trust-

ees to administer the Trust Funds and hereby ratifies and accepts the Trustees so appointed as if made by the Contractor.

ARTICLE X

HOURS OF WORK, OVERTIME, SHIFTS AND HOLIDAYS

Section 1. Work week and Work day. The work week shall consist of forty hours Monday through Friday. The standard work day shall consist of eight hours of work between the hours of 8:00 A.M. and 4:30 P.M., with one half hour unpaid lunch to commence no earlier than 11:30 A.M. and no later than 12:30 P.M. The standard work day may be changed to 7:00 A.M.—3:30 P.M. or 7:30 A.M.—4:00 P.M. to accommodate job conditions on five days' notice from the project contractor, or less notice as is mutually agreed upon. Starting time shall commence and quitting time shall occur at the employee's change shack.

Section 2. Overtime. Overtime pay shall be established by reference to the applicable Schedule A or B. There will be no restriction upon the contractor's scheduling of overtime or the non-discriminatory designation of employees who shall be worked. There shall be no pyramiding of overtime pay under any circumstances.

Section 3. It shall not be a violation of this Agreement if the Contractor considers it necessary to suspend all or a portion of the job to protect the life and safety of an employee. In such cases, employees will be compensated only for the actual time worked; provided, however, that where the employer requests employees to remain at the site and available for work, the employees will be compensated for the standby time at their base hourly rate of pay.

Section 4. Shifts. Shift work will be performed in accordance with the currently existing Schedule A's and B's.

Section 5. Holidays. Recognized holidays on this Project shall be those in the local collective bargaining agreements in existence for the appropriate Local Unions on April 1, 1989. There shall be no change in the established holiday schedules, and the days upon which those holidays are celebrated, except by mutual agreement.

Section 6. Reporting Pay.

(a) Employees who report to the work location and who are not provided with work, for whatever reason, shall receive two (2) hours' pay at their regular straight time rate, unless personally notified not to report at least two (2) hours prior to the departure time of their Contractor-provided transportation, or the start of the shift, whichever is earlier. A general radio and television announcement procedure will be established by the Project Contractor and published in the Project work rules. Announcements will be made every 15 minutes. This procedure will apply only to cancellation of work caused by inclement weather. For purposes of work on Deer Island and this provision only, "work location" shall mean the departure point for Contractor-provided transportation.

(b) When employees have started working on a shift but have worked less than four (4) hours, then four (4) hours at the straight time rate shall be paid; if the employees have worked more than four (4) hours, then they will be paid for eight (8) hours of pay at the employees' straight time rate. For purposes of this provision only, "started work" on Deer Island shall mean arrival at the island by Contractor-provided transportation.

(c) When an employee has completed his scheduled shift and is "called out" to perform special work of a casual, incidental or irregular nature, he shall receive overtime pay for actual hours worked with a minimum guarantee of four (4) hours' pay at the employee's straight time rate.

(d) When an employee leaves the job or work location of his own volition or is discharged for cause or is not working as a result of the Contractor's invocation of Section 3 above, he shall be paid only for the actual time worked.

(e) In all cases, if the employee is reporting on a day on which a premium rate is paid, reporting pay shall be calculated at that rate.

Section 7. Timekeeping. The Contractor may utilize brassing systems to check employees in and out. Each employee must check himself in and out. The Contractor will provide adequate facilities for checking in and out in an expeditious manner.

Section 8. Meal Period. The Contractor will schedule a meal period of not more than one-half hours duration at the work location at approximately four hours into the scheduled shift, consistent with Section 1; provided, however that the Contractor may, for efficiency of the operation, establish a schedule which coordinates the meal periods of two or more crafts. If an employee is required to work through his meal period, he shall be compensated in a manner established in the applicable Schedule A or B.

ARTICLE XI

APPRENTICES

Section 1. Recognizing the need to maintain continuing supportive programs designed to develop adequate numbers of competent workers in the construction industry, the Contractor will employ apprentices in their respective crafts to perform such work as is within their capabilities which is customarily performed by the craft in which they are indentured. The Contractor may utilize apprentices and such other appropriate classifications as are contained in the applicable Schedule A or B, in a ratio not to exceed 25% of his work force by craft, unless

the applicable Schedule A provides for higher percentage. Apprentices and such other classifications as are appropriate shall be employed in a manner consistent with the provisions of the appropriate Schedule A or B.

Section 2. The parties recognize that the size and scope of the Boston Harbor Project, the number of craftsmen and others expected to be employed in order to complete the work in a timely fashion, and the extended period of time during which the construction will be underway, should provide significant employment opportunities for qualified residents of the areas served by the Authority. Equally important, the parties recognize that persons currently lacking the basic skills and qualifications to enter skilled apprenticeship programs will have the opportunity through such basic training programs as the Building Opportunities Program to obtain the requisite qualifications and be considered for employment on the Project. The parties will endeavor to support such Programs and employ participants and graduates of such Programs consistent with the hiring obligations of this Agreement and the needs of the Contractor for skilled and experienced craftsmen and apprentices.

ARTICLE XII

SAFETY, PROTECTION OF PERSON AND PROPERTY

Section 1. In accordance with the requirements of the Occupational Safety and Health Act, it shall be the exclusive responsibility of each Contractor on the job site to ensure safe working conditions for its employees and their compliance with any safety rules contained herein or established by the Contractor or Project Contractor, provided however, it is understood that the employees have an obligation as set forth in Section 2 below.

Section 2. Employees must use diligent care to perform their work in a safe manner and to protect them-

selves and the property of the Contractor or the Authority. Failure to do so will be grounds for discipline, including discharge.

Section 3. Employees covered by the terms of this Agreement shall at all times while in the employ of the Contractor be bound by the safety, security, and visitor rules as established by the Contractor and/or the Project Contractor in accordance with applicable State and Federal safety and health statutes and regulations. These rules will be published and posted in conspicuous places throughout the Project.

ARTICLE XIII

SECURITY OF MATERIAL, EQUIPMENT AND TOOLS

The inspection of incoming shipments of equipment, apparatus, machinery and construction materials of every kind shall be performed at the discretion of the Contractor by individuals of its choice. All employees shall comply with the security procedures established by the Authority, Project Contractor, and/or Contractor.

ARTICLE XIV

NO DISCRIMINATION

Section 1. The Contractor and Unions agree that they will not discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin or age in any manner prohibited by law or regulation. It is recognized that special procedures may be established by joint agreement of the parties to this Agreement and governmental agencies for the training and employment of persons who have not previously qualified to be employed on construction projects of the type covered by this Agreement. The parties to this Agreement will make all good faith efforts to assist in

the proper implementation of such orders, regulations or agreements for the benefit of the population within the jurisdiction of the Authority.

Section 2. Any complaints regarding application of the provisions of Section 1 should be brought to the immediate attention of the involved Contractor for consideration and resolution.

Section 3. The use of the masculine or feminine gender in this Agreement shall be construed as including both genders.

ARTICLE XV

TRAVEL AND SUBSISTENCE

Section 1. Travel expenses, travel time, subsistence allowance and/or zone rates shall not be applicable to this Agreement except as follows:

It is recognized that, for work at certain locations on the site, special conditions and requirements exist under which all employees will be transported by Contractor-furnished transportation to the work location. Such transportation will either be by bus or water ferry to Deer Island or Nut Island. For the duration of the Contractor's work under this Agreement, employees required to utilize such Contractor-provided transportation shall receive an allowance equal to one-half hour's pay at their basic rate for each trip made, in addition to their pay for time worked. This allowance shall not be considered compensation for time worked, and shall not be paid to any employee who qualifies under Article X, Section 6 for any other pay for time not actually worked. At no time during the life of this Agreement will employees be charged for contractor provided parking or transportation.

Employees arriving at their work location after their normal starting time as the result of any delay in the scheduled arrival of Contractor-furnished transportation

shall be compensated from their normal starting time at the appropriate rate.

Employees whose Contractor provided transportation delivers them back to their assembly point at the end of their work day more than fifteen (15) minutes after their scheduled arrival time shall receive thereafter an additional allowance equal to pay at their regular straight time rate, in 15 minute increments, minus fringes, until the actual time of arrival.

Section 2. Workers shall be at their place of work at the starting time established by the Contractor and shall remain at their place of work performing their assigned functions under the supervision of the Contractor until quitting time. The parties reaffirm their policy of a fair day's work for a fair day's wage.

ARTICLE XVI

WORKING CONDITIONS

Section 1. There will be no rest periods, organized coffee breaks or other non-working time established during working hours. Individual coffee containers will be permitted at the employee's work location.

Section 2. The Project Contractor and/or Contractor shall establish such reasonable Project rules as each Project Contractor deems appropriate. These rules will be explained at the pre-job conference and posted at the Project site by the Contractor and may be amended thereafter as necessary. Failure to observe these rules and regulations by any employee shall be grounds for discipline, including discharge.

Section 3. Tools of the Trade. The welding/cutting torch and chain fall are tools of the trade having jurisdiction over the work performed. Employees using these tools shall perform any of the work of the trade. There shall be no restrictions on the emergency use of any tools or equipment by any qualified employee or on the use of

any tools or equipment for the performance of work within his jurisdiction, provided that the employee can safely use the tools and or equipment involved.

Section 4. Employees work under the supervision of the craft foreman or general foreman.

ARTICLE XVII

SAVINGS AND SEPARABILITY

Section 1. It is not the intention of either the Contractor or the Union parties to violate any laws governing the subject matter of this Agreement. The parties hereto agree that in the event any provisions of the Agreement are finally held or determined to be illegal or void as being in contravention of any applicable law, the remainder of the Agreement shall remain in full force and effect unless the part or parts so found to be void are wholly inseparable from the remaining portions of this Agreement. Further, the Contractor and Union agree that if and when any and all provisions of this Agreement are finally held or determined to be illegal or void by Court of competent jurisdiction, the parties will promptly enter into negotiations concerning the substance affected by such decision for the purpose of achieving conformity with the requirements of an applicable law and the intent of the parties hereto.

Section 2. This Article shall not be construed to waive the prohibitions of Article VI, and if the parties are unable to resolve their differences, the matter shall be referred to [*Same as Article II, Section 9*] for resolution.

ARTICLE XVIII

DURATION OF THE AGREEMENT

This Project Labor Agreement shall be effective May 22, 1989, and shall continue in effect for the duration of the Project construction work described in Article II

hereof. Construction of any phase, portion, section or segment of the Project shall be deemed complete when such phase, portion, section or segment has been turned over to the Authority and has received the final acceptance from the Authority's representative.

Schedule A's and B's attached to this Project Agreement shall continue in full force and effect until the Contractor and/or Union parties to the Collective Bargaining Agreements which are the basis for such Schedule A's and B's notify the Project Contractor of the mutually agreed upon changes in those provisions of such Agreements which are applicable to the Project, and their effective date(s), which shall become the effective date(s) under this Agreement.

The parties agree that any provisions negotiated into said collective bargaining agreements will not apply to work on this Project if such provisions are less favorable to the Contractor than those uniformly required of Contractors for construction work normally covered by those agreements; nor shall any provision be recognized or applied on this Project if it may be construed to apply exclusively or predominantly to work covered by this Project Agreement.

It is understood that the Project Contractor may cancel this Agreement upon sixty (60) days' notice as to any signatory Union which negotiates terms or conditions after the effective date of this Agreement for inclusion in a Collective Bargaining Agreement which forms the basis for a Schedule A, if the Project Contractor, in its sole and exclusive discretion, determines that such terms or provisions are damaging to the Project or the Authority's rate payers. However, it is further understood that any issue which the Project Contractor has submitted to arbitration under this Agreement will not be cause for exercise of this provision.

The Union agrees that there will be no strikes, work stoppages, sympathy actions, picketing, slowdowns or

other disruptive activity affecting the Project by any Union involved in the negotiation of such Local Collective Bargaining Agreements and the resulting Schedule A's, nor shall there be any lock-out on this Project affecting the Union during the course of such negotiations. Any disagreement between the parties over the incorporation into Schedule A of such provisions agreed upon in the negotiation of the Local Collective Bargaining Agreement which serves as the basis for the Schedule A shall be referred to the [*same as Article II, Section 9*] for resolution. In this Article and throughout this Agreement, references to "Schedule A's" includes, also, "Schedule B's".

In witness whereof the parties have caused this Agreement to be executed and effective as of the day and year above written.

For the Union	For the Project Contractor
/s/ John F. Simmons President, Building and Construction Trades Council of the Metropolitan District	/s/ K. W. Willis Project Manager, Kaiser Engineers, Inc.
/s/ Joseph W. [Illegible] Secretary-Treasurer Building Trades Council of the Metropolitan District	/s/ C. R. Fitzgerald Vice President, Kaiser Engineers, Inc.
/s/ Robert A. Georgine President, Building and Construction Trades Department, AFL-CIO	
/s/ Joseph F. Maloney Secretary-Treasurer, Building and Construction Trades Department, AFL-CIO	

APPENDIX J

MASSACHUSETTS WATER RESOURCES AUTHORITY

INSTRUCTIONS TO BIDDERS

* * * * *

SECTION 13—AWARD OF CONTRACT

13.1 The general contract will be awarded to the lowest responsible and eligible general bidder complying with the conditions and requirements provided in these Instructions, the bid forms and the other bid documents. A "responsible" bidder is a bidder demonstrably possessing the skill, ability and integrity necessary to faithfully perform the work called for by the contract, based upon a determination of competent workmanship and financial soundness in accordance with the provisions of Section 44D of Massachusetts General Laws Chapter 149. An "eligible" bidder is a bidder who is able to meet the requirements for bidders set forth in Sections 44A through 44H of said Chapter 149 and not debarred from bidding under section 44C of said Chapter 149 or any other applicable law, and who shall certify that he is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed on the work. In the interests of such harmony and the long-term supply of skilled manpower, each successful bidder and any and all levels of subcontractors, as a condition of being awarded a contract or subcontract, will agree to abide by the provisions of the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement as executed and effective May 22, 1989, by and between Kaiser Engineers, Inc., on behalf of the Massachusetts Water Resources Authority, and the Building and Construction Trades Council of the Metropolitan District and its affiliated local unions, Local 52, Bricklayers; Local 424, Carpenters; Local 133, Laborers; and the Building and

Construction Trades Department, AFL-CIO and its affiliated International Unions and their affiliated local unions, and will be bound by the provisions of that agreement in the same manner as any other provision of the contract. A copy of the agreement is attached and included as part of these Contract Documents. The attachments (Schedule A's and B's) are not attached to the Agreement but are incorporated by reference as if fully set forth. Copies of said schedules may be examined by the bidders at the address specified in the Advertisement for Bids where Documents may be obtained, and are available upon request; except that Schedule B's are applicable to and available for projects including tunnel work only.

APPENDIX K

Sections 8(e) and 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(e) and (f), provide:

> (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producers, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.
>
> (f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an em-

ployer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment. will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

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Nos. 91-261, 91-274

In The

Supreme Court of the United States

October Term, 1991

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT,

Petitioners,

vs.

ASSOCIATED BUILDERS & CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et al.*,

Respondents.

(Continued)

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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October Term, 1991

MASSACHUSETTS WATER RESOURCES AUTHORITY and KAISER ENGINEERS, INC.,

Petitioners,

vs.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et al.*

Respondents.

QUESTION PRESENTED

1. Whether this Court should review a Court of Appeals' holding that governmental interference with the process of private sector collective bargaining is preempted by the National Labor Relations Act, where the holding is entirely consistent with recent, controlling Supreme Court decisions, and no conflict among the Circuits has been shown to exist.

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Nos. 91-261, 91-274

In The

Supreme Court of the United States

October Term, 1991

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, *et al.*,

Petitioners,

vs.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et al.*

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Associated Builders & Contractors of Massachusetts/Rhode Island, Inc., *et al.*, hereby respond to separate petitions filed concerning the same judgment by the Building and Construction Trades Council of the Metropolitan District ("BCTD"), No. 91-261, and The Massachusetts Water

Resources Authority ("MWRA") and Kaiser Engineers, Inc. ("Kaiser"), No. 91-274. Respondents request that this Court deny the petitions for a writ of certiorari to review the opinion by the Court of Appeals for the First Circuit in this case. That opinion is reported at 935 F.2d 345.[1]

STATEMENT OF THE CASE

The Massachusetts Water Resources Authority ("the MWRA") is a governmental agency authorized by the Massachusetts Legislature to provide water supply services and sewage collection, treatment and disposal services for the eastern half of Massachusetts. The MWRA is charged with effecting a large series of public works projects over a ten year period for the purpose of cleaning up the Boston Harbor and surrounding areas (JA18-20).

The means and methods of carrying out this task are set forth in the MWRA's enabling statute, Mass. Gen. Laws, Ch. 92, § 1-1, *et seq.*, and the Commonwealth's public bidding laws. Mass. Gen. Laws, Ch. 149, §§ 45A-45L and Ch. 30, § 39M. Pursuant to these laws, the MWRA provides the funds for construction (assisted by state and federal grants), owns the property to be built, establishes all bid conditions, decides all contract awards, pays the contractors, and generally exercises control over all aspects of the project.[2]

In May, 1988, the MWRA appointed a "Project Contractor",

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1. Respondents have no parent or subsidiary companies to list in accordance with Rule 29.1 of this Court.

2. As is acknowledged by the petitioners (MWRA Pet. at 18, n.8), Massachusetts law requires that the MWRA itself award all construction contracts through a competitive bidding process, pursuant to statutorily prescribed bid specifications.

Kaiser Engineers, Inc. ("Kaiser"), to oversee the construction of new treatment facilities and the upgrading of existing facilities required for the clean-up (JA17). Work on the project began, using both union and non-union contractors. In November of 1988, two member unions of the Building and Construction Trades Council ("the Trades Council") picketed the project and precipitated a brief work stoppage, which was ended by establishment of separate entrances to the job site, a well recognized method of maintaining continuity of work in the construction industry (JA277-8). Other threats were made to disrupt the work, but no other significant disruption actually occurred. (*Id.*).

On May 22, 1989, Kaiser, acting as MWRA's agent, entered into the MWRA Agreement with the Trades Council. The Agreement states that it was negotiated by Kaiser "on behalf of" the MWRA, and with MWRA's express approval (JA43, Agreement Caption, p.i.). Both Kaiser and the Trades Council understood that the Agreement could not be implemented without MWRA's approval (JA381). Subsequently, the MWRA did approve the Agreement and incorporated it into all advertisements for bids on project contracts (JA23, Bid Specification 13.1).

The Agreement, which all contractors and subcontractors who bid on the project were required to sign pursuant to Specification 13.1, required that the petitioner Trades Council's member unions serve as the sole and exclusive bargaining representatives for all craft employees on project contracts (Art. III, § 1), and that all employers awarded work on the project must be bound by the Trades Council unions' collective bargaining agreements, which were expressly incorporated by reference (Art. IX, XI). This meant, *inter alia*, that all employees would be referred by local union hiring halls (*id.* §§ 2, 3), that all employees would be subject to the union's compulsory membership provisions and local collective bargaining agreements (*id.* § 4), and that employers were required

to make contributions to a variety of union benefit trust funds and to observe restrictive union work rules and job classifications (Art. IX) (JA54-58, 64-66, 71, 76-77).

Because the Agreement was incorporated into the bid specifications for all work on the project, Plaintiffs could not bid for this government work without waiving their rights to negotiate freely with a union representing a majority of their employees. Thus, the MWRA Agreement forced the plaintiffs and other contractors, both union and non-union, to abandon their right to negotiate their own terms of employment or to operate on a non-union basis, in order to obtain work on this government project.

The "union-only" restriction, imposed on all successful bidders and subcontractors, effectively deterred non-union contractors from bidding on project work. The imposition of specific contract terms adversely affected numerous unionized contractors as well.[3] The MWRA Agreement thereby reduced the degree of competition in the bidding process and also threatened to increase the overall cost of the project (JA207-208, 217-218).

Approximately 75% of all construction work in this country is performed on a non-union basis (JA200). Only 21% of all employees in the construction industry are union members. (*Id.*). In Massachusetts, more than 60% of all construction work is performed on a non-union basis (JA216). Non-union employers and employees have performed hundreds of construction jobs in the Commonwealth working side by side with unionized firms. without significant labor disruption (JA206, 216).

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3. Amicus briefs were filed in support of ABC's position before the Court of Appeals by the National Association of Manufacturers and by the Utilities Contractors Association of New England, both of whom represent many unionized employers.

Contrary to petitioners' claims (BCTC Pet. at 12; MWRA Pet. at 12), there is no evidence in the record of this case that "union-only" project agreements are "widely-used" by state or local governments anywhere in the country. In this regard, it is important to distinguish between "project labor agreements," which may properly establish certain conditions of employment without interfering in the process of collective bargaining, and a "union only" agreement such as that which is at issue in the present case, which requires actual recognition of unions and agreement to a union contract. Only the latter type of agreement, of which there is no record evidence from other states, requires private employers to recognize and adopt union collective bargaining agreements as a condition of performing government work.[4]

In September, 1989, respondents protested the government's enforcement of the MWRA Agreement to the Massachusetts Department of Labor and Industries (JA125). The protest was denied,[5] and the respondents filed suit in the United States District

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4. The BCTC Petition confuses the two types of agreements in seeking to characterize the type of agreement enforced by the MWRA as "widely used" (BCTC Pet. at 12). The petitioners also list various project agreements supposedly involving government entitles, many of which were either not local government projects or were not "union-only" (BCTC Pet. at 12-13, n.5; MWRA Pet. at 12). More importantly, the project agreements listed by petitioners are nowhere to be found in the record of this case, and should be stricken or disregarded. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 156, n.6 (1970). ("Manifestly, [extra-record evidence] cannot be properly considered by us in the disposition of the case.") Ironically, the only record evidence of another state's project labor agreement was introduced by *respondents* and demonstrated how a large tunnel project had been built without any union-only requirements (JA451).

5. The Deputy General Counsel of the Department's Civil Division agreed with Respondents that the MWRA Agreement constituted governmental interference with the collective bargaining process in violation of the National

(Cont'd)

Court seeking declaratory and injunctive relief for numerous violations of their statutory and constitutional rights (JA11). In addition, respondents asked for a preliminary injunction against enforcement of the MWRA Agreement through any bid specifications which required private contractors to waive their statutory bargaining rights as a condition for receiving government work (JA141).[6]

The District Court denied respondents' motion and an appeal followed (App. 72a-83a). On October 24, 1990, a unanimous panel of the Court of Appeals for the First Circuit reversed the District Court and issued the requested preliminary injunction (App. 49a-71a). The Court of Appeals granted rehearing *en banc* and then reaffirmed its decision by a 3-2 vote (App. 1a-48a). Both the panel opinion and the *en banc* decision found that the state agency's enforcement of the "union-only" Agreement as a condition for the award of government work to private contractors constituted unlawful governmental inteference in the collective bargaining process in a manner preempted by the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*[7]

(Cont'd)
Labor Relations Act (JA423, 427-433). He was ultimately overruled on other grounds, with no further discussion of the preemption issue at the administrative level.

6. Respondents did not seek to delay the clean-up project itself in any way, nor is there any record evidence of delay attributable to respondents' motion.

7. The preliminary injunction ordered by the panel opinion remained in effect during the Court of Appeals' reconsideration and has of course remained in place since the en banc reaffirmance. During this period of nearly one year, there is no evidence that any of the speculative concerns raised by the petitioners in support of the Agreement, such as increased labor disputes or construction delays, have occurred.

SUMMARY OF ARGUMENT

The Court of Appeals properly held that the MWRA's imposition of union collective bargaining agreements on private employers as a condition of their performing government work was preempted by the National Labor Relations Act. The court found that the MWRA's enforcement of its "union-only" project agreement directly interfered with, and indeed "eliminated", the process of private sector collective bargaining.

Contrary to petitioners' claims, this result was squarely within the confines of this Court's decisions on the subject of labor law preemption. *Golden State Transit Corp. v. City of Los Angeles,* 475 U.S. 608 (1986) (*Golden State I*), and 110 S. Ct. 444 (1989) (*Golden State II*); *Machinists v. Wisconsin Emp. Rel. Commission,* 427 U.8. 132 (1976).

Petitioners have failed to identify any conflict between the First Circuit's decision and any decision of this Court. Nor have they identified any conflict among the Circuits concerning the issue presented for review. Indeed, as petitioners have acknowledged, the only other Court of Appeals to consider this issue has reached the same result as the First Circuit. *Glenwood Bridge, Inc. v. City of Minneapolis,* ____ F.2d ____, 137 LRRM 3001 (8th Cir. Aug. 2, 1991). Under these circumstances, and particularly in light of the interlocutory procedural posture of this case, no useful purpose would be served by Supreme Court review, and the petitions should be denied.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE COURT OF APPEALS PROPERLY APPLIED SUPREME COURT AUTHORITY PROHIBITING GOVERNMENTAL INTERFERENCE IN THE PROCESS OF PRIVATE SECTOR COLLECTIVE BARGAINING UNDER THE NATIONAL LABOR RELATIONS ACT, AND NO CONFLICT ON THIS ISSUE EXISTS WITHIN THE CIRCUITS.

A. The First Circuit's Decision Is Fully Consistent with this Court's Holdings on Labor Law Preemption.

The present case involves an attempt by a state government agency to interfere pervasively in the process of private sector collective bargaining. In enjoining such state interference, the Court of Appeals applied in a straightforward manner recent decisions by this Court which are directly on point and which properly dictated the outcome below. *See Golden State Transit Co. v. City of Los Angeles,* 475 U.S. 608 (1986), and 110 S. Ct. 440 (1989). *Machinists v. Wisconsin Emp. Rel. Comm'n*, 427 U.S. 724 (1976); *see also, Wisconsin Dept. of Industry v. Gould, Inc.*, 475 U.S. 282 (1986); *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236 (1959); *Guss v. Utah Labor Relations Board,* 353 U.S. 1 (1957).

Contrary to petitioners' claims (MWRA Pet. at 14-21; BCTD Pet. at 14-24), the decision below neither expands nor alters the principles set forth by this Court in the *Golden State Transit* cases. Rather, the First Circuit properly applied the plain holding of *Golden State Transit* to prevent direct local government interference with the process of collective bargaining.

In *Golden State Transit,* the Court preempted a city's attempt to condition a private employer's continued ability to obtain a city franchise on that employer's adoption of a union agreement. The Court held that the city's actions constituted an attempt to regulate conduct associated with the bargaining process, which Congress intended to be left unregulated by any governmental party. Thus, in *Golden State I,* the Court squarely held:

> Free collective bargaining is the cornerstone of the structure of labor-management relations carefully designed by Congress when it enacted the NLRA . . . . Even though agreement is sometimes impossible, government may not step in and become a party to the negotiations . . . . A local government, as well as the National Labor Relations Board, lacks the authority to "introduce some standards of properly 'balanced' bargaining power" . . . or to define "what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining."

475 U.S. at 619 (citations omitted).

In *Golden State II,* which upheld the award of damages to the employer under the NLRA and 42 U.S.C. § 1983, the Court made even more explicit its ruling prohibiting governmental interference in the process of private sector collective bargaining:

> . . . Congress intended to give parties to a collective bargaining agreement the right to make use of "economic weapons," not explicitly set forth in the Act, free from governmental interference. "[T]he Congressional intent in enacting the comprehensive federal law of labor relations"

> required that certain types of peaceful conduct "must be free of regulation." The *Machinists* rule creates a free zone from which all regulation "whether federal or state", . . . is excluded.

110 S. Ct. at 451 (citations omitted). Finally, so that there could be no doubt as to the protection of private sector collective bargaining rights from governmental interference, the Court held:

> The *Machinists* Rule is . . . akin to a rule that denies either sovereign the authority to abridge a personal liberty . . . [T]he interest in being free of governmental regulation of "the peaceful methods of putting economic pressure on one another" . . . is a right specifically conferred on employers and employees by the NLRA.

110 S. Ct. at 451-52.

In the present case, the MWRA's intrusion into the process of collective bargaining was even more direct than the government actions which were found to be unlawful in the *Golden State Transit* and *Machinists* cases. As the Court of Appeals observed, at App. 17a:

> In the present case, the state's intrusion into the bargaining process is pervasive. The state not only mandates that a labor agreement be reached before a bid is awarded, but dictates with whom that agreement is going to be entered, and specifies what its contents shall be. For all intents and purposes the state here eliminates the bargaining process altogether.

Respondents have never claimed, nor did the Court of

Appeals suggest, that state governments are forbidden to regulate specific labor conditions which may also be subjects of collective bargaining. *See e.g., Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724 (1985). The enjoined Agreement, however, did not merely "relate" to or "impact" upon collective bargaining (MWRA Pet. at 15-16), it eliminated the *process* of collective bargaining altogether. It is for that reason that the state's action was found to be preempted, a result clearly compelled by *Golden State Transit* (App. 17a).

The Court of Appeals also properly held that Sections 8(e) and/or 8(f) of the NLRA provide no license for a state agency to interfere in the collective bargaining process (App. 22a). Neither the petitioners nor the dissenters below have explained why statutory provisions which have been narrowly confined by their terms to "employers" in the "construction industry", should be interpreted so as to apply to a state agency which is neither an "employer" nor a "construction industry employer". *See* 29 U.S.C. § 152(2).

At bottom, the petitioners' complaint is that the state agency is being denied the opportunity to engage in conduct which might be permissible, if only the agency were a private entity. On this point, however, the Court of Appeals properly cited *Wisconsin Dept. of Industry v. Gould,* 475 U.S. 272, 289-90 (1986), in which this Court spoke directly to this issue:

> [G]overnment occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints . . . . The NLRA, moreover, has long been understood to protect a range of conduct against state but not private interference. [Citing *Machinists* and *Teamsters v. Morton.*] The Act treats state action differently from private action not merely because

they frequently take different forms, but also because in our system states simply are different from private parties and have a different role to play.

Once again, the *Golden State Transit* case is also directly on point. The city's conduct there, severing relations with a transportation carrier, would have been entirely permissible if done by a private purchaser of that carrier's services. Indeed, such actions are commonplace reactions of private companies confronted with strike interruptions affecting performance by service providers. This Court properly held, however, that the city's action in this regard constituted *governmental* interference with collective bargaining and was therefore preempted.

Similarly misguided is the petitioners claim that the Court of Appeals improperly intruded into "proprietary" interests of the state, which should somehow be entitled to different treatment from the state's "regulatory" activities (MWRA Pet. at 21-25). Here petitioners have quoted out of context from the *Gould* case, and have attempted to ignore the fact that *Gould* rejected the very distinction for which they now argue. As the Court of Appeals properly noted (App. 65a-66a), this Court in *Gould* held that the "market participant" doctrine, borrowed by petitioners from Commerce Clause cases, has no place in the law of labor preemption. As the *Gould* Court stated:

[T]he "market participant" doctrine reflects the particular concerns underlying the Commerce

> Clause, not any general notion regarding the necessary extent of state power in areas where Congress has acted.
>
> * * *
>
> What the Commerce Clause would not permit states to do in the absence of the NLRA is thus an entirely different question from what States may do with the Act in place.
>
> * * *
>
> [W]e cannot believe that Congress intended to allow States to interfere with the "interrelated federal scheme of law, remedy, and administration" under the NLRA as long as they did so through exercises of the spending power.

475 U.S. at 289-290 (citations omitted). *See also, Golden State Transit Corp. v. City of Los Angeles,* 475 U.S. at 614 n.5 (1988). ("The fact that the city acted through franchise procedures rather than a court order or a general law also is irrelevant to our analysis.").[8]

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8. The record in this case further demonstrates that the proprietary/regulatory distinction argued for by the petitioners would "swallow the rule," as the Court of Appeals properly found (App. 20a). The state has not only sought to foreclose freedom in collective bargaining on the MWRA's ten year, $6 billion series of projects, but also intended to impose the same requirement on a series of large highway projects in Boston (JA542), Thus, the state would have foreclosed collective bargaining on an overwhelming percentage of all state-financed construction, which would have had the same effect as if the state simply passed a law barring non-union contractors from all state-financed construction.

Petitioners have also wrongly attempted to characterize the present case as somehow conflicting with the Court's recent decision in *Gregory v. Ashcroft,* 111 S. Ct. 2395 (1991). That case involved an entirely different statute, the Age Discrimination in Employment Act, 29 U.S.C. § 621, and an entirely different state function, *i.e.,* the selection of judges. Petitioners have ignored the principal basis for the Court's holding in that case, which was that the power of the states to select their own judges "is a decision of the most fundamental sort for a sovereign entity." *Id.* at 2400. The present case, by contrast, involves the NLRA, a statute in which Congress has plainly spoken against any governmental interference in the process of collective bargaining, and a state action which has plainly intruded into that process. *Machinists v. Wisconsin Emp. Rel. Comm'n,* 427 U.S. 132 (1976). Thus, the Court of Appeals properly enjoined the state's action here and no conflict exists with any holding of this Court.

B. Review of this Case Would Be Premature Due to the Absence of Any Conflict Within the Circuits and Due to the Interlocutory Procedural Posture of the Decision Below.

As petitioners have acknowledged (MWRA Brief at 12, n.5; BCTD Brief at 14), the only other Court of Appeals which has addressed the issues decided by the First Circuit has agreed completely with the holding of the court below. *Glenwood Bridge, Inc. v. City of Minneapolis,* ____ F.2d. ____, 137 LRRM (BNA) 3001 (8th Cir. Aug. 2, 1991). There is thus no conflict within the Circuits concerning the issues presented by the petitioners.

Absent any conflict within the Circuits, there would appear to be no reason for intervention by this Court. To the extent that the issues presented have any importance at all, they plainly fall within this Court's policy of exercising restraint in the grant of certiorari to allow further lower court analysis of varying fact patterns. *See McCray v. New York,* 461 U.S. 961, 863 (1983)

(Stevens, J.) (certiorari denied where issue requires "further study" in lower courts).

The procedural posture of the present case also makes it a poor candidate for review. The ruling appealed from is the granting of a motion for preliminary injunction, an interlocutory order. This type of interlocutory ruling has previously been held to militate against the granting of certiorari. *See Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967); *American Const. Co. v. Jacksonville T.& K.R. Co.*, 148 U.S. 372, 384 (1893) ("[T]his court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience . . . ").

As previously noted at p. 6, the injunction now being challenged has been in place for almost one year, with no record evidence of any inconvenience or harm to the petitioners, or to the Boston Harbor Project, resulting therefrom. It would therefore be a sound exercise of this Court's discretion to await a case with different facts, and/or a case presenting some actual conflict among the Circuits, prior to exercising review.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Petitioners Massachusetts Water Resources Authority and Kaiser Engineers, Inc., hereby reply to Respondents' Brief in Opposition to the petition for writ of certiorari.

1. Respondents' opposition to the petition maintains adamantly but unsuccessfully that this Court has already decided the case. In fact, the Court's prior decisions provide no answers to the questions posed in the petition. The case law does not instruct when and whether this Court's preemption doctrine restricts the proprietary conduct of the states. Nor does it define in a fashion instructive here the reach of the *Machinists* doctrine. Were the law clear, the sharp divisions within the two circuits to have reached the issue presented here would not have occurred.

The opposition, by its silence, also confesses the lack of any evidence of congressional intent to support the court of appeals' finding of preemption. Only two sentences in the entire opposition even address the statute that allegedly preempts state action. And the sum of these sections, Section 2(2) which places the states beyond the reach of the NLRA, and Sections 8(e) and (f) which specifically authorize agreements in the private sector such as that challenged here, add up to exactly the opposite conclusion from that reached by the court of appeals.

2. The Respondents' efforts to cast the Agreement as the type of governmental regulation the Court has found to be preempted in the past ignore the fact that, to the contrary, the Agreement is a carefully considered procurement decision for a single project. As a result, their analysis of the economic consequences of the Agreement is flawed. Respondents contend the Agreement will increase the cost of the project. The sole basis for this contention in the record is identical statements in form affidavits executed by two officers of the Respondent association that on typical large projects their members can save as much as 20 percent on labor costs by flexible work rules and hours. J.A. 207, 217. The Boston Harbor Cleanup, they neglect to consider, is not a typical project.

The unrebutted record evidence of the economic consequences of the Agreement is set forth in the affidavit of the public official responsible for the timely progress of the project. Program Management Director Richard Fox points out that the project is being conducted pursuant to a detailed court-ordered schedule that makes no allowance for delay from labor disputes. J.A. 274-75. His own personal experience with labor disruption early in the project and his appreciation of the potential consequences of the simultaneous presence of numerous contractors and construction trades on a constrained site have demonstrated to him the susceptibility of the project to work stoppages. J.A. 275-81. In Director Fox's informed judgment, delays

from work stoppages would result not only in cost overruns but also in prolonged environmental harm. J.A. 281-82. His judgment is not mere speculation but has been proved in the marketplace. A determinative cost in any multi-billion dollar construction project is the cost of borrowing, and Director Fox has personal experience that the Agreement enhanced the marketability of the Authority's bonds in early 1990. J.A. 283-84.

The findings of the district court are consistent with the views of Director Fox. The purpose of the Agreement, the court found, was "to maintain the court-ordered schedule and avoid the risk of substantial fines for noncompliance." App. 75a. "In the absence of such an agreement," the court continued, the consequences would be "increased costs to the [Authority]." App. 75a-76a.

The question here is whether Congress would disapprove the Authority's managing the project as it sees fit, solely to permit Respondents both to bid on the project on their own terms and to maintain their non-union status. The Authority has not foreclosed Respondents from participating in the project; nor does it wish to do so. Rather, the Authority seeks only the right to purchase construction services on the terms it judges best suited to a single, unique construction project.

3. Respondents' contention that this Court should not grant review because the court of appeals' decision was rendered on appeal from the denial of a preliminary injunction and the case is therefore at an interlocutory stage is disingenuous. The court of appeals has decided that the Authority may not require prospective contractors to adhere to the Agreement as a condition for bidding for work. That decision has been rendered first by a panel and then by a divided court sitting *en banc*. This Court has not hesitated in the past to grant review in preliminary injunction cases, *see, e.g., Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531 (1987); *University of Texas v. Camenisch*, 451 U.S. 390 (1981);

Houchins, Sheriff of the County of Alameda, California v. KQED, Inc., 438 U.S. 1 (1978); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); and this case, presenting a pure issue of law, is well-suited for the Court's attention.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the petition, the Court should grant the petition for a writ of certiorari.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, PETITIONER

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, INC., PETITIONERS

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Sections 8(e) and 8(f) of the National Labor Relations Act expressly permit private employers to implement agreements requiring all contractors performing work on a construction project to adhere to a collective bargaining agreement that establishes labor terms and union recognition for the project as a whole. The question presented is whether the doctrine of implied preemption under the NLRA nevertheless prohibits a state agency from acting in its proprietary capacity to implement such an agreement for a state public works construction project.

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BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, PETITIONER

v.

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v.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. The Massachusetts Water Resources Authority (MWRA) is a governmental agency authorized by the Massachusetts legislature to provide water-supply services

and sewage-collection, treatment and disposal services for the eastern half of Massachusetts. Following a lawsuit arising out of the discharge of sewage into Boston Harbor in violation of the Clean Water Act, 33 U.S.C. 1251 *et seq.*, the MWRA was ordered by a federal district court to meet a detailed timetable to carry out the clean-up of the Harbor. It is estimated that this task, known as the Boston Harbor Clean-up Project, will require the expenditure of $6.1 billion for public works over a ten-year period. See *United States* v. *Metropolitan District Comm'n*, 757 F. Supp. 121, 123 (D. Mass.), aff'd, 930 F.2d 132 (1st Cir. 1991).

The means of carrying out the project are set forth in the MWRA's enabling statute, 1984 Mass. Acts 372, and the Commonwealth's public bidding laws, Mass. Gen. Laws ch. 149, §§ 44A-44L & ch. 30, § 39M (& Supp. 1990). See Pet. App. 3a. Pursuant to those laws, the MWRA provides the funds for construction (assisted by state and federal grants), owns the property to be built, establishes the bid conditions, and makes all contract awards. MWRA Pet. App. 3a, 74a.[1]

2. In April 1988, MWRA retained Kaiser Engineers, Inc. (Kaiser), a private construction contractor, as its program/construction manager. Kaiser's primary function is to manage and supervise the ongoing construction activity. Another important function of Kaiser, however, was to advise MWRA regarding development of a labor-relations policy that would maintain labor-management peace for the duration of the project. MWRA had already experienced work stoppages and informational picketing at various sites. MWRA was concerned that because of the scale of the project and the number of different craft skills involved, it was vulnerable

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[1] "MWRA Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 91-274.

to numerous delays, thus placing the court-ordered time schedule in jeopardy and subjecting MWRA to contempt citations. These concerns were heightened by the limited access to the major work site, Deer Island, which would enable a small number of pickets to stop the entire project. MWRA Pet. App. 3a-4a, 74a-75a.

Aware of these concerns, Kaiser recommended to MWRA that it be permitted to negotiate with unions in the building and construction trades, through the Building and Construction Trades Council (Council), in an effort to arrive at an agreement that would assure labor stability over the life of the project. Any agreement would be subject to review and final approval by MWRA. MWRA Pet. App. 75a, 105a. MWRA accepted Kaiser's recommendations, and in May 1989, Kaiser and the unions negotiated an agreement—the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement (the Master Labor Agreement). See *id.* at 107a-140a.

The Master Labor Agreement states that it is the policy of MWRA that "the construction work covered by this Agreement shall be contracted to Contractors who agree to execute and be bound by the terms of this Agreement." MWRA Pet. App. 109a. It requires all contractors to recognize the Council as the bargaining representative for all craft employees performing work on the project, to hire workers through the hiring halls of the Council's constituent unions, to require hired workers to join the relevant union within seven days, to follow specified dispute-resolution procedures, to apply the Council's wage, benefit, seniority, apprenticeship and other rules, and to make contributions to the Council unions' benefit funds. In return, the unions agreed not to engage in any strikes or work stoppages during the ten-year life of the project. *Id.* at 5a-6a, 32a, 75a.

On May 28, 1989, MWRA approved the Master Labor Agreement as the labor policy for the project and directed that Specification 13.1 be added to the bid specifications

for all new construction work.[2] MWRA Pet. App. 5a, 75a. Specification 13.1 provides, in pertinent part, that:

> [E]ach successful bidder and any and all levels of subcontractors, as a condition of being awarded a contract or subcontract, will agree to abide by the provisions of the [Master Labor Agreement] as executed and effective May 22, 1989, by and between [Kaiser], on behalf of [MWRA], and the [Trades Council] * * * and will be bound by the provisions of that agreement in the same manner as any other provision of the contract * * *.

Id. at 141a-142a. Successful bidders are accordingly required to abide by the Master Labor Agreement, but the bidding is not restricted to union contractors. The specifications provide that any qualified bidder may compete for a contract, without regard to whether the contractor has a pre-existing bargaining relationship with a union, and the contract must be awarded to the lowest qualified bidder.

Nonunion bidders are also not required to sign any other agreement with any unions for other projects. In addition, although a contractor must agree to use the local union's job referral system for labor on the project (or to give preference to applicants referred by the local union if the union has no such referral system), the job referral system must be operated in a non-discriminatory manner so that employees who are not already union members are nevertheless eligible for project work. MWRA Pet. App. 103a-104a, 110a, 116a-117a.

3. On March 5, 1990, respondent Associated Builders and Contractors of Massachusetts/Rhode Island (ABC)—

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[2] Massachusetts law expressly requires the MWRA, as well as other procuring agencies, to award contracts pursuant to a competitive bidding process. See page 2, *supra*; Pet. App. 3a; *Modern Continental Construction Co.* v. *Lowell*, 465 N.E.2d 1173 (Mass. 1984).

an association of nonunion contractors—filed this suit in the United States District Court for the District of Massachusetts seeking an injunction barring enforcement of Bid Specification 13.1 on the ground, *inter alia*, that it impermissibly interferes with the system of free collective bargaining contemplated by the National Labor Relations Act (NLRA). On April 11, 1990, the district court issued a memorandum and order rejecting ABC's preemption and other claims, and denied a preliminary injunction. MWRA Pet. App. 72a-83a.

In the meantime, another contractors' association, the Utility Contractors Association of New England, had filed an unfair labor practice charge with the National Labor Relations Board (NLRB), alleging that Kaiser's project agreement with the Council violates the NLRA. On June 25, 1990, after the district court had ruled, the General Counsel of NLRB refused to issue a complaint, finding that the agreement is lawful under the construction industry proviso to Section 8(e) of the NLRA, 29 U.S.C. 158(e), and is a valid prehire agreement under Section 8(f), 29 U.S.C. 158(f). See *Building & Trades Council, et al. (Kaiser Engineers, Inc.)*, Case 1-CE-71, GC Advice Memo (reproduced at MWRA Pet. App. 88a-93a).

4. On October 24, 1990, a panel of the First Circuit reversed the district court's decision, agreeing with ABC's contention that MWRA's Bid Specification 13.1 is preempted by the NLRA. MWRA Pet. App. 49a-71a. On rehearing en banc, the court of appeals, by a 3-2 vote, adhered to that ruling. *Id.* at 1a-48a.[3]

The en banc majority believed that "the present case is most heavily influenced by the Supreme Court's hold-

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[3] After issuance of the panel's decision, the district court entered a preliminary injunction barring enforcement of Bid Specification 13.1. The en banc court continued that injunction in effect pending rehearing. MWRA Pet. App. 86a-87a. The ultimate decision by the en banc court, which affirmed the panel's decision, continues that injunction in effect. *Id.* at 31a.

ings in the *Golden State Transit Corp.* cases,[4] which relied and expanded upon the *Machinists* doctrine."[5] MWRA Pet. App. 15a. It understood "the lesson of the *Golden State* cases [to be] that, where interference into the collective bargaining process by the state is *direct*, an asserted state interest of the type at issue here, whether 'proprietary' or otherwise, cannot justify the interference." *Id.* at 30a. In this case, the majority concluded that Bid Specification 13.1, by requiring all contractors to comply with the Master Labor Agreement negotiated by Kaiser, constitutes direct interference with the collective bargaining process. *Id.* at 17a. The majority recognized that Sections 8(e) and 8(f) of the NLRA expressly permit such special contractual arrangements in the construction industry, *id.* at 22a-24a, and that under those provisions, "the Master Labor Agreement between the Trades Council and Kaiser is a valid labor contract." *Id.* at 24a. But it found the legality of the agreement itself to be "irrelevant" to the question whether Bid Specification 13.1—by which MWRA requires adherence to that agreement—is preempted. *Id.* at 24a-25a.

In dissent, Chief Judge Breyer, joined by Judge Campbell, believed the "only question in this case is whether the NLRA forbids the MWRA, because it is a state agency, to do what the Act explicitly permits a private contractor to do." MWRA Pet. App. 32a. In his view, far from upsetting the balance between labor and management that Congress intended, the MWRA's contracting decision affects labor-management relations "only to the extent that Congress foresaw and (with respect to general contractors) explicitly authorized" in Sections 8(e) and 8(f). Pet. App. 34a.

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[4] See *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608 (1986) (*Golden State I*), and *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103 (1989) (*Golden State II*).

[5] See *Lodge 76, Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976).

DISCUSSION

In our view, the court of appeals erred. It should have found that Massachusetts did not exceed its legitimate authority to specify the terms and conditions for contracting on its own public works project. Implied preemption under the NLRA is inappropriate in this context because the Commonwealth has not sought to regulate collective bargaining in Massachusetts. It has only sought to exercise a proprietary right that Congress expressly conferred on private employers—the right to require all contractors working on a construction project to adhere to a collective bargaining agreement with a union. The NLRA was designed to avoid undue interference in the States' conduct of their own affairs by excluding States from the definition of "employers" covered by the Act, yet the decision below expands the implied preemption doctrine to deny States rights that are afforded even to private employers.

Although there is as yet no conflict in the decisions of the courts of appeals, we believe that the issue is of such substantial importance that review is warranted. This Court's precedents do not clearly resolve the preemption issue that is thoroughly discussed in the divided opinions of the en banc court below. This uncertainty poses significant difficulties for States seeking to assure stability in the performance of their public works projects. In this case alone, the decision has nullified a key contractual provision in the massive public works project for the clean-up of Boston Harbor—a project that must be completed according to a schedule established by the judgment in a suit brought by the United States to remedy substantial violations of the Clean Water Act. The decision similarly threatens the validity of other project agreements that have been utilized in connection with construction of a wide variety of other major public works across the country, and will serve to deter the States from utilizing such terms in new public works projects until the issue is finally settled. We therefore

believe that it is appropriate to grant certiorari in this case.

1. The holding by the court of appeals majority that federal law preempts MWRA's requirement that contractors on MWRA's construction project abide by the labor agreement previously negotiated by its construction manager rests primarily on that branch of NLRA preemption law known as *Machinists* preemption. MWRA Pet. App. 15a, 30a; see *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976); see also *Teamsters* v. *Morton*, 377 U.S. 252 (1964). This Court has explained that the *Machinists* doctrine is designed "to govern pre-emption questions that arose concerning activity that was neither arguably protected * * * nor arguably prohibited" by the NLRA's specific terms. *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 749 (1985).[6] Under that doctrine, the courts must determine if a State's regulation of conduct conflicts with Congress's intention that certain labor-related conduct remain "unregulated" and left to "the free play of economic forces." *Machinists*, 427 U.S. at 140.

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[6] The *Machinists* doctrine is distinct from the other major branch of NLRA preemption doctrine—*Garmon* preemption—which governs cases involving state regulation of conduct that is either arguably protected or arguably prohibited by the NLRA's specific regulatory terms. See *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959); see also *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. at 748-751 (describing "two distinct NLRA preemption principles").

Although relying primarily on the *Machinists* doctrine, the majority below expressed the view that the *Garmon* preemption doctrine also "most likely applies to Specification 13.1." MWRA Pet. App. 30a; see also *id.* at 15a, 21a. The only explanation for this view was an assertion that the agreement's provision for union recognition interferes with employee rights under Section 7 of the NLRA, 29 U.S.C. 157. Pet. App. 21a. However, as we explain at pages 9-10, *infra*, Section 8(f) of the NLRA specifically sanctions prehire agreements in the construction industry and protects employee free choice by permitting employees to file a petition for a representation election during the term of such an agreement.

The state action in issue here does not cause any impermissible interference with federal labor policy, because the use of binding project labor agreements in the construction industry is specifically sanctioned by Sections 8(e) and 8(f) of the NLRA. Section 8(e) ordinarily prohibits agreements between an employer and a union that preclude an employer from doing business with any other party, such as a non-union contractor. The section contains a "construction industry proviso," however, which nevertheless permits preclusive arrangements between a union and an employer in the construction industry that concern the contracting or subcontracting of work to be performed at a construction jobsite. Furthermore, Section 8(f) of the NLRA also adopts a special rule of labor relations for the construction industry by permitting "prehire agreements" under which employers will recognize unions as bargaining representatives of employees who have not yet been hired.[7]

Operating together, Sections 8(e) and 8(f) validate project labor agreements in the construction industry—collective bargaining agreements that establish labor terms and union recognition for a construction project as a whole, and that require all contractors and subcontractors who are subsequently engaged to work on the project to agree to be bound by the agreement's provisions. See *Jim McNeff, Inc.* v. *Todd*, 461 U.S. 260, 265-266, 270 n.9 (1983); *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 659-660 & n.12, 662, 663 & n.15 (1982). Accordingly, both the majority and the dissenters below agreed that there would have been no interference with or distortion of the economic forces that Congress expected to govern labor relations in the construction industry if the project labor agreement chal-

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[7] To protect employee free choice, however, Section 8(f) contains a proviso that permits employees, once hired, to utilize the NLRB election process if they choose to reject the bargaining representative, or to cancel the union security provisions of the prehire agreement.

lenged in this case had been entered into solely by a private general contractor such as Kaiser. MWRA Pet. App. 24a, 34a-35a. They disagreed, however, on whether it makes a difference that an agency of the Commonwealth of Massachusetts (MWRA), rather than a private party, authorized negotiation of the agreement and then effectuated it by requiring contractors to adhere to its terms as a condition of performing work on the state-owned project. *Id.* at 27a-28a, 35a, 40a-41a.

2. a. In finding MWRA's Bid Specification 13.1 preempted, the majority relied principally upon this Court's decisions in the *Golden State* cases. See note 4, *supra*. In *Golden State I*, the Court held that the city's action in conditioning renewal of the company's taxicab operating license on the company's settlement of its labor dispute with the union by a certain date was preempted by the NLRA. The Court reasoned that the city had "[entered] into the substantive aspects of the bargaining process to an extent Congress has not countenanced" by setting "time limits on negotiations [and] economic struggle." 475 U.S. at 616 (quoting *Machinists*, 427 U.S. at 149). In *Golden State II*, the Court held that the company was entitled to sue for compensatory damages under 42 U.S.C. 1983, because the city's action in violating the company's "right to use permissible economic tactics to withstand the strike" deprived it of "a personal liberty" guaranteed by federal law. 493 U.S. at 112.

The majority below read the *Golden State* cases as establishing an absolute rule that "where interference into the collective bargaining process by the State is *direct*, an asserted state interest of the type at issue here, whether 'proprietary' or otherwise, cannot justify the interference." MWRA Pet. App. 30a. The *Golden State* decisions, however, do not create any absolute preemption policy. Rather, the test under *Golden State* is whether the State has "[entered] into the substantive aspects of the bargaining process *to an extent Congress has not countenanced*." *Golden State I*, 475 U.S. 616 (emphasis

added) (quoting *Machinists*, 427 U.S. at 149). Thus, the *Golden State* decisions require inquiry into whether the particular state action conflicts with an intention by Congress to leave the specific conduct involved to the free play of economic forces. In this case, the dissenting judges below correctly concluded that MWRA's actions are in all relevant respects indistinguishable from those of private contractors that are expressly permitted by the NLRA *despite* their potential impact on the free play of economic forces between other contractors and their employees on a construction project, and that those actions do not affect the NLRA's operation in any ways unintended by Congress.

The first step in the *Golden State/Machinists* analysis is to identify the precise right that the NLRA assertedly "protect[s] against governmental interference." *Golden State II*, 493 U.S. at 108. In the view of respondents and the majority below, the protected right is the right of contractors "to negotiate their own terms of employment or to operate on a non-union basis." Br. in Opp. 4; MWRA Pet. App. 18a, 21a. Although employers in other industries may have that right, the construction industry proviso to Section 8(e) limits both the legal right and practical ability of contractors in that industry to order their own labor relations. By virtue of the proviso, a general contractor has the right to require all other employers working on a particular jobsite to adhere to the terms of a master labor agreement it has entered into with union representatives. Accordingly, the nonunion contractors that are members of respondent ABC would have had no right protected by the NLRA to obtain work on a nonunion basis at the Boston Harbor Project if it had been privately owned, if the owner had retained Kaiser as its general contractor, and if Kaiser, in turn, had entered into a project agreement identical to that challenged here. It follows that MWRA is trenching on no right accorded by the NLRA to nonunion (or other) contractors by requiring them, as a condition of obtain-

ing work on the project, to abide by the union agreement that Kaiser negotiated with MWRA's approval.

b. The majority below in fact acknowledged that "under the exceptions established by Sections 8(e) and 8(f) of the Act, the Master Labor Agreement between the Trades Council and Kaiser is a valid labor contract." MWRA Pet. App. 24a. But it found that conclusion to be "irrelevant to the preemption issue at hand," because the "history of Sections 8(e) and 8(f) discusses private employers only," and nowhere "is there any indication that a state would be allowed to impose this type of regulation." Pet. App. 24a-25a. The majority also believed that "Congress is perfectly capable of distinguishing between states and private parties when it chooses, and it has so chosen here," since Sections 8(e) and 8(f) refer to an "employer," and Section 2(2) (29 U.S.C. 152(2)) excludes from the definition of that term "any State or political subdivison thereof." Pet. App. 27a.

However, as Chief Judge Breyer pointed out in dissent, "Congress had two perfectly good reasons for not making the construction-industry exceptions explicitly applicable to states, and neither of these reasons suggests any preemptive intent." MWRA Pet. App. 41a. First, "the list of forbidden practices, to which the exceptions apply, itself applies only to an 'employer,' defined to exclude 'any State,' thereby leaving the regulation of labor relations between a state and its own employees primarily to state law"; accordingly, a "drafter, writing a statutory exception to the resulting prohibition, would not normally extend its scope beyond those subject to the prohibition in the first place." *Ibid.* Second, when Congress enacted the construction industry exceptions in 1959, it "had little reason to believe that a court might find, hidden in the silence of the Act, some other relevant prohibition applicable to a state." *Ibid.*

Further, this Court has concluded that when Congress enacted Section 8(e)'s construction industry proviso and Section 8(f), it intended to preserve the existing "pat-

tern of collective bargaining in the construction industry." *Woelke & Romero*, 456 U.S. at 657. It therefore is significant that in the detailed testimony preceding enactment of those provisions, the pattern described for construction of public works (*e.g.*, dams, roadways, and bridges) was no different from that for purely private projects.[8] In addition, the reasons identified in the legislative history for authorizing prehire bargaining in the construction industry—the special circumstances making meaningful posthire collective bargaining difficult, the general contractor's need to predict labor costs, and the contractor's need to have available a steady supply of

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[8] See, *e.g.*, *Hearings on S. 1973 Before the Subcomm. on Labor and Labor-Management Relations of the Senate Comm. on Labor and Public Welfare*, 82d Cong., 1st Sess. 27, 29, 31, 35, 39, 45 (1951); see also Council Pet. 11 (discussing Labor Department study concluding that project agreements have been used for many decades on both private and public development projects).

The Court in *Woelke & Romero* also relied (456 U.S. at 658-659 & n.11) on the discussion in the legislative history of *Associated General Contractors of America, Inc. (St. Maurice, Helkamp & Musser)*, 119 N.L.R.B. 1026 (1957), review denied and enforced *sub nom. Operating Engineers Local Union No. 3* v. *NLRB*, 266 F.2d 905 (D.C. Cir.), cert. denied, 361 U.S. 834 (1959). That case involved a union agreement governing construction work on Travis Air Force Base in California that was undertaken pursuant to a contract with the Army Corps of Engineers. 119 N.L.R.B. at 1027, 1049; 266 F.2d at 906. See also 105 Cong. Rec. 15,541 (1959) (Mem. of Reps. Thompson and Udall, cited in *Woelke & Romero*, 456 U.S. at 662 n.13) ("the building trades unions and contractors follow the practice of working out a scale of wages and other terms of employment which will be applicable to all projects within a specified geographical area for a substantial period of time," and "[t]his practice has been encouraged by the Atomic Energy Commission and other Government agencies"); *Labor-Management Reform Legislation: Hearings on S. 505, S. 748, S. 76, S. 1002, S. 1137, and S. 1311 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 86th Cong., 1st Sess. 496 (1959) (testimony of Richard J. Gray, President of Building and Construction Trades Department, AFL-CIO, quoting S. Rep. No. 1509, 82d Cong., 2d Sess. 3-4 (1952)) (the "United States Government * * * is directly concerned in the proper pricing and completion

labor [9]—hold true whether it is a public contractor or a private contractor that lets the contracts for the work. This background greatly undermines the court of appeals' and respondents' notion that Congress, without saying so, intended to deny the States and their political subdivisions the benefits of agreements permitted by Sections 8(e) and 8(f) when they act in a proprietary capacity.

By contrast, we share petitioners' view that the position of the majority below would frustrate congressional intent and produce arbitrary distinctions in prehire practices within the construction industry. Whether there is a prehire union agreement covering an entire project "would often reflect, not size of the project, or desire of the parties, or special conditions of the industry, but simply whether or not the entity letting the contracts is an arm of the state or private." MWRA Pet. App. 40a. And even among state projects, "the presence or absence of such an agreement would depend upon whether state law permits the state in question to have a private contractor (who, then, presumably, would be free to enter into a prehire agreement), or, as in Massachusetts, requires the state agency to sign the relevant contracts itself." *Id.* at 40a-41a.

c. The court of appeals majority also believed that its holding was supported by *Wisconsin Dep't of Industry* v. *Gould*, 475 U.S. 282 (1986), which held that a Wisconsin statute debarring certain repeat violators of the NLRA from doing business with the State was preempted by the NLRA. See MWRA Pet. App. 25a-30a. In rejecting the contention that the State was merely acting as a purchaser of services, the Court acknowledged that "[n]othing in the NLRA * * * prevents private purchasers from

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of construction projects for defense installations and production facilities," and prehire agreements are important for "large projects, particularly for defense installations and plants").

[9] See, *e.g.*, S. Rep. No. 187, 86th Cong., 1st Sess. 27-29 (1959) (reproduced at MWRA Pet. App. 46a-48a); see also Pet. App. 37a-40a (Breyer, C.J., dissenting).

boycotting labor law violators," but added that "[t]he Act treats state action differently from private action * * * because in our system States simply are different from private parties and have a different role to play." 475 U.S. at 290.

Gould, however, is clearly distinguishable from this case. The state debarment rule in *Gould* "serve[d] plainly as a means of enforcing the NLRA," and "[n]o other purpose could credibly be ascribed" to it. 475 U.S. at 287. Here, by contrast, MWRA is not seeking to enforce the NLRA, punish NLRA violators, or further any regulatory role. It seeks only to protect its *own* proprietary interests in the stable and efficient development of a major governmental project, and it does so, as a private developer would, through lawful arrangements relating to project labor agreements. Indeed, the labor agreement in issue here actually was negotiated, apparently without direction from MWRA, by Kaiser, the private construction manager and general contractor that MWRA selected.

Nothing in *Gould* suggests that where, as here, the State is seeking to further its legitimate proprietary concerns through an arrangement expressly authorized by the NLRA, its action nevertheless is preempted. To the contrary, the *Gould* Court specifically noted that it was "not say[ing] that state purchasing decisions may never be influenced by labor considerations," and that it was "not faced here with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs." 475 U.S. at 291. This case directly implicates those concerns, and thus presents the issue left open by *Gould*.

3. We recognize that the First Circuit decsion does not conflict with the decision of any other court of appeals, but we nevertheless believe that review by this Court is warranted. The preemption analysis adopted in this case has invalidated a major contractual undertaking by the Commonwealth of Massachusetts, and thereby threatened the

timely, cost-effective clean-up of the Boston Harbor.[10] The decision also casts doubt on the validity of similar project labor agreements that have been utilized for the construction of a wide variety of public projects (both state and federal), including hospitals, tunnels, airports, convention centers, hydroelectric projects, waste treatment facilities, and mass transit systems. See Council Pet. 12-13 & n.5; MWRA Pet. 12; California, *et al.*, Amicus Br. 2 n.1.[11] In the circumstances of these projects, the responsible governmental entities, including federal agencies, found that such agreements were important to ensuring stability, an available labor supply, and timely completion of major construction projects needed to further substantial public purposes. The undertaking of such public projects is a central function of state and

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[10] We are advised that the unions have only agreed to continue to honor the agreement pending the outcome of the proceedings in this Court. If certiorari is not granted, the unions may seek to repudiate the agreement, on the premise that a fundamental term of the bargain has been invalidated.

[11] Respondents attempt (Br. in Opp. 5) to distinguish between "union-only" project agreements and those that "establish certain conditions of employment without interfering in the process of collective bargaining." They assert that "there is no evidence in the record of this case that 'union-only' project agreements are 'widely-used' by state or local governments anywhere in the country." However, as the Unions point out (Council Reply Br. 4-5), respondents "offer no evidence that there are, in actual practice, two distinct types of project labor agreements, or that in the public sector, use of the supposedly 'less offensive' type of agreement predominates." Indeed, the Baltimore Harbor Tunnel Thruway agreement (see C.A. App. 451), the only agreement cited by respondents as an example of the supposedly "less offensive" type, requires all contractors to abide by a collective bargaining agreement and recognize union representation of their employees. See C.A. App. 455, 462-463. Moreover, as the Council observes (Reply Br. 5), "a public entity's decision to require contractors to adhere to a supposedly 'less offensive' project agreement—which is still a collectively bargained agreement that 'establish[es] certain conditions of employment' * * * for all project work"—would also appear to be unlawful under the First Circuit's reasoning.

local governments. Such projects therefore "implicate[] 'interests so deeply rooted in local feeling and responsibility,' that pre-emption should not be inferred." *Gould*, 475 U.S. at 291 (quoting *Garmon*, 359 U.S. at 243-244).

A number of similar challenges have in fact been filed in at least three other circuits. These cases indicate that the issue is a recurring one, that this Court will ultimately have to resolve the question, and that deferring review has highly adverse consequences for state and local governments. Relying on the decision below, a divided panel of the Eighth Circuit recently enjoined the City of Minneapolis from using a project labor agreement in its construction of a new municipal bridge. See *Glenwood Bridge, Inc.* v. *City of Minneapolis*, 940 F.2d 367 (1991). Challenges to public works projects carried out under similar arrangements are also now pending in two other circuits where the preemption claims were rejected by the district courts. *Phoenix Engineering, Inc.* v. *M-K Ferguson of Oak Ridge Co.*, No. Civ. 3-90-839 (E.D. Tenn. Mar. 22, 1991), appeal pending, No. 91-5527 (6th Cir.) (rejecting claim that NLRA prohibited involvement by Department of Energy in project labor agreement for construction services at Department's Oak Ridge Operations); *Areo Electric* v. *Watkins*, No. CV 90-0075-E-EJL (D. Idaho May 14, 1991) (rejecting claim that NLRA bars project labor agreement on Department of Energy project); *Associated Builders & Contractors* v. *City of Seward*, No. A91-001 (D. Alaska Mar. 20, 1991), appeal pending, No. 91-35511 (9th Cir.) (granting summary judgment in favor of the city). Although other circuits may ultimately reject the view of the First and Eight Circuits, there is no reason to expect the en banc resolution of the First Circuit to change. On balance, we therefore believe that the States' rights to engage in such conduct should be settled at this time.[12]

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[12] There is no merit to respondents' contention (Br. in Opp. 15) that this Court should not grant review because the court of appeals' decision was rendered on appeal from the denial of a pre-

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted.

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liminary injunction and the case is therefore at an interlocutory stage. The court of appeals has decided that MWRA may not require prospective contractors to adhere to the project agreement as a condition of bidding for work. That decision, which was rendered first by a panel and then by the court sitting en banc, determines with finality the legal issue of federal preemption involved in this case. In these circumstances, the issue is ripe for review by this Court. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51 (1938); see also *Laborers* v. *Curry*, 371 U.S. 542, 552 (1963).

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No. 91-274
No. 91-261

IN THE

Supreme Court of the United States

October Term, 1991

MASSACHUSETTS WATER RESOURCES AUTHORITY, KAISER ENGINEERS, INC. and BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT,

Petitioners,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *ET AL.*,

Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief of Amici Curiae National Constructors Association and Bechtel Corporation/Parsons Brinckerhoff, Quade & Douglas, Inc.

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(S1343—CVR-517)

CONSENT OF THE PARTIES

Counsel of record for petitioners and respondents in this action have consented to the filing of this amici brief and their written consent is filed concurrently herewith.

QUESTIONS PRESENTED

Amici adopt the Questions Presented set forth in the petitions for Writ of Certiorari.

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No. 91-274
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OCTOBER TERM, 1991

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ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et al.*,

Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICI CURIAE NATIONAL CONSTRUCTORS ASSOCIATION AND BECHTEL CORPORATION/PARSONS BRINCKERHOFF, QUADE & DOUGLAS, INC.

DESCRIPTION OF INTEREST OF AMICI CURIAE

The National Constructors Association ("NCA") is a not-for-profit organization comprised of the nation's largest, unionized construction companies.[1] As a group, NCA's members are involved in numerous, on-going construction projects across the country involving billions and billions of dollars. In addition to working on the nation's largest private sector construction projects, NCA members also regularly work on the nation's largest public construction projects on behalf of federal, state, and municipal governments.

NCA member companies are all "employers engaged primarily in the building and construction industry" within the meaning of the National Labor Relations Act, 29 U.S.C. §§151 *et seq.* (the "Act"). As such, NCA's members have been given important rights by Congress that are explicitly set forth in Sections 8(e) and (f) of the Act, 29 U.S.C. §§158(e) and (f). These NCA members regularly rely on these rights in negotiating project labor agreements that bind all contractors performing work on a project. These rights—as they apply to governmental projects—have been eviscerated by the decision below.

Bechtel Corporation/Parsons Brinckerhoff, Quade & Douglas, Inc. ("Bechtel/Parsons") is a joint venture and is the Construction Manager retained by the Massachusetts Department of Public Works (the "MDPW") to manage its Central Artery/Third Harbor Tunnel Project (the "Artery project"). The Artery project is one of the largest and most

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[1]NCA members include: ABB-CE Services, Inc., ABB Lummus Construction Company, The Austin Company, Badger America Inc., Bechtel Construction Company, Oscar J. Boldt Construction Company, Ebasco Constructors, Inc., Fluor Constructors International Inc., Kiewit Industrial Co., Leonard Construction Company, Parsons Constructors, Inc., The Rust Engineering Company, Stone & Webster Engineering Corporation, UE&C Catalytic, Inc., and Wright Schuchart Harbor Co.

complicated construction projects ever undertaken in this country. Its estimated cost will exceed four billion dollars and it will take approximately eight or more years to complete. The Artery project will include major improvements and expansion of two interconnecting Interstate highway systems (I-90 and I-91); construction of a new eight-to-ten lane underground expressway through downtown Boston; and construction of a new four lane tunnel under Boston Harbor connecting the Massachusetts Turnpike and the Logan Airport road system. Adding to the complexity of the Project is the fact that three-quarters of the construction will take place underground in a densely populated, urban area. It will also take place in or around existing mass transit systems that are already congested and cannot be taken out of service for any extended period of time during the construction.

Bechtel/Parsons, as Construction Manager of the Artery Project, occupies a role identical to that of petitioner Kaiser Engineers, Inc. ("Kaiser") on the Boston Harbor Project (the "Harbor project") that is the subject of this litigation. In that role, Bechtel/Parsons conducted a thorough analysis of the most cost-effective and efficient way to proceed with this project of unprecedented size and complexity. To ensure uniformity of work rules and to protect the project from strikes, picketing, and other disruptive and delaying effects of labor disputes, Bechtel/Parsons (like Kaiser) negotiated a special labor stabilization, or project, agreement to cover all construction on the Artery project site. And like Kaiser's agreement, Bechtel/Parson's labor contract requires that all contractors on the Artery project become bound to the agreement, recognize the signatory unions and utilize hiring halls. The MDPW, sponsor of the Artery project, included in its bid specifications the labor agreement's requirement that all contractors become bound to the project agreement, just as the Massachusetts Water Resources Authority included this same requirement from

Kaiser's labor agreement in its bid specifications for the Harbor project. Thus, the enforceability of this term of the Bechtel/Parsons' project agreement, together with the implementing state bid specifications, are intimately tied to the validity of the Harbor specifications.

The significance of the project agreement to a construction manager such as Kaiser, Bechtel/Parsons, or NCA members acting in that capacity cannot be overemphasized. By requiring that all contractors become bound, the labor agreement ensures that various work rules and conditions on the project site (for example, shift schedules, break times, travel times, holidays, etc.) will be standardized, thereby eliminating the numerous conflicting practices of individual contractors (whether union or nonunion) that would otherwise be in effect. Without this standardization, coordination of these differing work rules would be extremely difficult (if not impossible) and costly. In addition, both the Harbor and Artery project agreements contain binding grievance/arbitration procedures to resolve the inevitable work and jurisdictional disputes which will occur when thousands of employees, employed by scores of different employers and represented by dozens of different unions, work side-by-side on the same construction project.

But most importantly, the project labor agreement provides a comprehensive no-strike clause shielding against costly delays and disruptions caused by lawful strikes and picketing for the entire life of the project. To appreciate the significance of this no-strike pledge, one need only consider that there are approximately 24 different building trade unions in the Boston area. Each union typically is party to a two- or three-year agreement with contractors working within its trade jurisdiction. Since approximately 75% of major construction in the Boston area is performed by union contractors, the majority of the project contrac-

tors would be party to one of these 24 agreements even in the absence of the requirement of Bechtel/Parsons' (or Kaiser's) project agreement. *Utility Contractors Ass'n of New England, Inc. v. Comm'rs of MDPW*, No. 90-3035, slip. op. at pg. 1-2 (Mass. Super. Ct. August 2, 1990). With 24 contracts expiring every two or three years over the anticipated eight-year duration of the project, there would be between 50 and 100 separate negotiations for new collective bargaining agreements occurring among the contractor workforce. *Id.* Any one of these negotiations could result in a lawful strike delaying the completion of either the Artery or Harbor projects.

It is precisely this eventuality which is protected against by the comprehensive no-strike clauses contained in the Harbor and Artery project agreements. Of course, just as the proverbial chain is only as strong as its weakest link, a construction project's protection from lawful strikes is only as strong as the breadth of its no-strike clause. The ability of a union to lawfully picket and strike even one contractor on a project is often sufficient to bring an entire project to a standstill. Consequently, true protection can only be secured by ensuring that the no-strike pledge extends to *all* project contractors; this can only be accomplished by requiring that *all* contractors on the site become bound to the agreement.

The decision below effectively prevents Kaiser from implementing this significant requirement of its collective bargaining agreement—even though it was part of a labor agreement negotiated by a private sector employer in the construction industry—simply because the owner of the project is the Commonwealth of Massachusetts. Although the court found that the underlying collective bargaining agreement was lawful, it held that the Commonwealth's repetition in its bid specifications of the contract's require-

ment that all contractor's become bound rendered the specifications unlawful. Yet without inclusion in the bid specifications, this part of Kaiser's labor agreement is itself rendered unenforceable.

If the decision below is left undisturbed, Bechtel/Parsons' project labor agreement will be impacted similarly and the right of NCA members to use such Section 8(e) and 8(f) labor agreements on future public construction projects will be brought into serious question. This result is inimical to the best interests of the public entities that own the construction projects, the construction managers that direct them, and the public that must pay for them.

STATEMENT OF THE CASE

Amici adopt the Statements of the Case set forth in the Petitions for Writ of Certiorari, as well as the petitioners' descriptions of the Opinions Below, Jurisdiction, and Constitutional and Statutory Provisions Involved.

REASONS FOR GRANTING THE WRIT

By its 3-2 *en banc* decision, the court below has raised serious questions as to whether Section 8(e) and (f) agreements can be used on public construction projects. For the first time, a practice long-recognized and well-established on construction sites has been called into doubt when applied to a publicly owned construction project simply because, in accordance with state bidding laws, the requirements of a privately negotiated labor agreement applicable to all contractors on that project have been repeated in the project's bid specifications.

As detailed in the following pages, this Court's consideration of the issues raised by the decision below is appropriate because:

(1) the Court of Appeals seriously misapplied the federal pre-emption doctrine as developed by this Court, destroying significant federal rights of public owners, private construction employers, employees, and unions, and

(2) these issues are of critical importance to the management of public construction projects in this country, thus warranting definitive instruction from this Court.

I.

THE DECISION BELOW DISREGARDS CONGRESS' CAREFULLY CRAFTED STATUTORY SCHEME FOR THE CONSTRUCTION INDUSTRY, PERMITTING A "CRAZY QUILT" OF PRACTICES THAT ARE ANTITHETICAL TO THE OBJECTIVES OF THE FEDERAL PRE-EMPTION DOCTRINE.

A. The Court of Appeals' Decision Eliminates Substantial Rights of Construction Industry Employers.

In recognition of the unique needs of the construction industry, the 1959 Congress amended the Act by adding Sections 8(f) and (e). Section 8(f) explicitly authorizes employers in the construction industry—but no other employers—to enter into collective bargaining agreements before the first employee is even hired. These "pre-hire" agreements are permitted to provide for recognition of a union as the bargaining representative of employees; to require employees to pay union dues or equivalents; to obligate employers to use union hiring halls; and to set all other terms and conditions of employment on the construction site. *See NLRB v. Local Union No. 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335 (1978); *Local 100, United Ass'n of Journeymen and Apprentices v. Borden*, 373 U.S. 690 (1963).

Pre-hire agreements were sanctioned under Section 8(f) to protect the organizational and representational interests of construction unions and employees. Congress recognized that these employees could not effectively rely on traditional representational petitions and elections to unionize because of the nature of employment in the construction industry. *See* S. Rep. No. 187, 86th Cong., 1st Sess. 55-56, *reprinted in* 1 NLRB Legislative History of the Labor Management Reporting and Disclosure Act of 1959 at 451-52 ("Leg. Hist."); *John Deklewa & Sons*, 282 N.L.R.B. 1375 (1987), *enforced sub nom. Int'l Ass'n of Bridge Workers v. NLRB*, 843 F.2d 770 (3d Cir. 1988).

Section 8(f) was also enacted to accommodate the unique needs of construction industry employers. Congress viewed pre-hire agreements as critical to the industry for two reasons: employers needed to know their labor costs in advance of bidding on a project and they needed access to a ready supply of skilled craftsmen who could be available for quick referral (through the hiring hall) if they were awarded the job. H.R. Rep. No. 741, 86th Cong., 1st Sess. 19, 1 Leg. Hist. 777.

Congress' 1959 accommodations to employees, unions, and employers in the construction industry went beyond merely authorizing pre-hire agreements and included the addition of Section 8(e). Under this provision, a construction union and an employer are permitted to enter into an agreement that requires all contractors performing work on a particular project site to execute the labor agreement. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 660 (1982); *Connell Constr. Co. v. Plumbers and Steamfitters Local 100*, 421 U.S. 616, 633 (1975). This practice was an essential part of the "pattern of collective bargaining" in 1959, and Congress intended to preserve this practice through Section 8(e). *Woelke & Romero Framing*, 456 U.S. at 657. Indeed, Congress permitted these "union signatory"

clauses specifically to promote labor harmony and "to alleviate the frictions that may arise when union men work continuously alongside nonunion men on the same construction site." *Connell Constr. Co.*, 421 U.S. at 630 (*quoting Drivers Local 695 v. NLRB*, 361 F.2d 547 (D.C. Cir. 1966)).

The history of Sections 8(e) and (f) indicates that these construction industry accommodations were intended to apply to both public and private construction sites. This history strongly suggests that the pre-1959 pattern of bargaining Congress intended to preserve specifically included the use of Section 8(e) and (f) agreements on public construction projects.

The evidence before Congress in 1959 indicated no significant differences between the bargaining patterns on public and private projects. In congressional hearings held between 1951 and 1959 to assess the need for accommodations to the construction industry, there was testimony detailing the nature of the industry and the existing pattern of industry bargaining. The pattern of bargaining described for public works—the construction of dams, roadways, and bridges—was no different from that described for purely private projects. *See, e.g.*, Hearings Before the Subcommittee on Labor and Labor-Management Relations on S.1973, 82d Cong., 1st. Sess. 27, 29, 31, 35, 39 and 45 ("1951 Hearings"). These discussions of the construction industry drew no distinction between private and public construction projects.

Nor does logic suggest any difference between the treatment of private and public projects. The construction industry employer's need to estimate its costs and secure a ready supply of labor, and the employees' and unions' representational and organizational interests—all objectives served by Sections 8(e) and (f)—do not differ depending on whether the project's owner is a private or public entity.

In light of this, it seems clear that Congress understood that these agreements, which since have become known as standard Section 8(e) and (f) agreements, were a vital part of the public construction fabric in 1959. As such, Congress was as interested in preserving these agreements on public projects as it was on private construction sites because their importance was common to all construction projects.

Under the authority of these statutory provisions, Kaiser negotiated a pre-hire project agreement that required all contractors on the Harbor project site to become bound to its terms. That this agreement was valid and lawful in accordance with the terms of Sections 8(e) and (f) was recognized expressly by the court below. Yet in the very next breath, the Court of Appeals rendered that precise requirement unenforceable.

Like most pre-hire construction agreements, Kaiser's contract has the core requirement that all contractors on the Harbor project become bound to the agreement for work performed on that specific project. Without the uniformity provided by this requirement, the primary benefit of project stability is lost. On a privately owned project, the contract between Kaiser and the unions, including its requirement that all site contractors execute the agreement, would simply be implemented by Kaiser's direct contracting authority, *i.e.*, its insistence that successful bidders for project work execute its project labor agreement if they wished to be awarded the work. Similarly, on publicly owned projects where the construction manager contracts directly with all major project contractors and it is not necessary for the municipal or state owner to execute direct agreements with these contractors, the same project labor agreement requirement could be implemented by Kaiser's insistence that successful bidders for project work execute the project labor agreement. In both cases, there would be no question that the underlying project labor agreement generally, and its specific requirement that

all other contractors on the site execute the labor agreement as the *quid pro quo* for the receipt of project work, would be lawful under Sections 8(e) and (f). *See Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 270, n. 9 (1983).

Because of the complexity of the Harbor project and the requirements of the Massachusetts' bidding laws, the Commonwealth had to let major contracts directly to project contractors. This resulted in the Commonwealth adhering to the formality of individually contracting with each entity performing major work on the site. In addition, the essential requirements for working on the project had to be contained in the Commonwealth's bid specifications. In this instance, that meant including in the specifications the requirement of Kaiser's labor contract that all project contractors must become bound to that labor agreement. The court below found that, by so complying with state law and by merely including the requirements of Kaiser's project labor agreement in the specifications, the Commonwealth's specifications were unlawful as an impermissible state intrusion into labor matters affecting prospective project contractors.

Necessarily following from the decision below, although never addressed by the court, is the fact that this core provision in Kaiser's project labor agreement is rendered unenforceable by the court's decision. Because Kaiser cannot contract directly with project contractors, it also cannot directly implement its mandate that all other contractors become bound to its labor agreement, something which is critical to the agreement's purpose and success. The only mechanism available under these state-required contracting limitations for implementing this mandate is the Commonwealth's bid specifications. By invalidating the specifications, a key provision of the agreement itself was rendered unenforceable and Kaiser was denied its rights under Sections 8(e) and (f). This occurred even though all five of the judges below agreed that the project agreement was lawful.

B. The Court of Appeals' Decision Establishes Form, Rather Than Substance, As The Touchstone For Federal Pre-emption, Creating A Patchwork Result Contrary To The Objective of Uniformity Underlying The Pre-emption Doctrine.

As this Court has stated in other contexts, federal pre-emption is to be based upon the substance of state regulation and not the form it takes. Most often this has caused courts to find various state actions pre-empted because substantively they impermissibly impose on federal labor policy, even though in form they do not purport to regulate labor matters at all. *See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985) and *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614, n.5 (1986). The decision below ignores this basic principle by applying pre-emption based on the form of state action rather than its actual substance.

The "state's intrusion" into labor matters as found by the court below is not the *state's* intrusion at all. The contested requirement referenced in the bid specifications (*i.e.*, that all contractors become bound to Kaiser's labor agreement) was not independently imposed by the Commonwealth but rather was merely a repetition of the requirement contained in the private labor agreement negotiated by the project's construction manager, Kaiser. Substantively, the labor agreement and all its requirements—including those contested here—belong to Kaiser, not to the Commonwealth.

That these requirements are repeated in the Commonwealth's bid specifications is a matter of form not of substance. For reasons completely unrelated to labor relations or policy, each major contract let on the Harbor project must be let through direct contract with the Commonwealth and not with the project's construction manager; the bid specifications for each portion of the work must include notice of

the appropriate requirements in order for those requirements to be enforced. In this case, the appropriate requirements are the provisions of the private labor agreement between Kaiser and the unions, and the contested bid specifications do no more than provide the necessary notice of the contract's requirements to interested bidders.

The mixed results created by the decision below provide an enlightening illustration of why this Court has always held that substance, and not form, must govern in the pre-emption arena. Under the First Circuit's analysis, this same project agreement would, presumably, be valid and fully enforceable on this same project if Massachusetts had simply permitted Kaiser to implement its labor agreement by contracting directly itself (Kaiser) with all project contractors, thus obviating the need for the bid specification. Similarly, if, in order to implement the labor agreement's mandate that all project contractors become bound to that agreement, Massachusetts law did not require it to be included in the specifications, the issue of pre-emption would not have arisen. Each of these situations is substantively identical to the circumstances of this case. The only difference lies in the form required for implementation of the Kaiser labor agreement.

What emerges from this decision, in the words of dissenting Chief Judge Breyer, is the possibility of creating an "odd crazy-quilt of pre-hire practices." Depending solely upon the peculiar bidding law requirements, or practices, of various states and municipalities, what might be lawful on one public construction project might well be unlawful, as "pre-empted," on another. The irony is that it is precisely to avoid such an "odd crazy-quilt" that the doctrine of federal labor pre-emption exists. *See Amalgamated Ass'n of Street, etc. v. Lockridge*, 403 U.S. 274, 285-88 (1971) and *Garner v. Teamsters, Chauffeurs and Helpers, etc.*, 346 U.S. 485, 490-91 (1953).

Perhaps the ultimate irony, however, is that most project contractors would likely be confronted with the requirement that they comply with union labor agreements even in the absence of the contested bid specifications. Many of the contractors with which the Commonwealth contracts directly for major pieces of the construction process are themselves signatories to Section 8(f) labor agreements that contain provisions authorized by Section 8(e). These contractors' individual labor agreements therefore would restrict their subcontracting to employers who agree to become bound to their individual labor agreements. This is the very "evil" the court below sought to avoid. And because it will be accomplished through a pre-hire agreement, with a Section 8(e) sanctioned contracting clause but without the support of a bid specification, the result will be immune from pre-emption attack and unquestionably lawful.

Thus, under the decision below, most project contractors would still be subject to union agreements, but they—and the public—would not have the benefits of the project agreement. While second tier contractors would have the same hiring hall and union recognition requirements that the First Circuit majority found offensive, the project would be denied the protection of the comprehensive no-strike clause and uniformity of work rules that Kaiser, through its greater bargaining leverage, was able to extract from the unions in the project agreement. From the viewpoint of the public, which must pay for this project, this is the worst of two worlds.

C. The Decision Below Fails To Advance Any of the Objectives of the Federal Pre-emption Doctrine.

Federal labor pre-emption exists to avoid conflict between state and federal policy and to advance the congressional determination that some matters of labor policy were intended to be left unregulated, *i.e.*, to be controlled by

"the free play of economic forces." *See Golden State Transit Corp.*, 475 U.S. at 614 (*quoting Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1986)).

Neither of these objectives is served here. It is readily apparent that the contested state action—the Commonwealth's inclusion of the Kaiser project labor agreement requirement in its bid specifications—in no way conflicts with federal labor policy. The alleged wrong—requiring all project contractors to become bound to this agreement regardless of their own labor policies—is completely consistent with explicit federal labor policy. *See Woelke & Romero Framing*, 456 U.S. at 663; *Jim McNeff, Inc.*, 461 U.S. at 270 n. 9.

Nor does the Commonwealth's inclusion of the requirements of the Kaiser contract in its bid specifications impose "regulation" where Congress intended there to be none. The decisions cited above demonstrate unequivocally that bargaining in the construction industry, insofar as it relates to pre-hire agreements and contracting clauses, is not unregulated, but is heavily regulated by Sections 8(e) and (f). And "implicit in the construction industry proviso" of Section 8(e) is the understanding that this regulation includes acceptance of a union contract as the *quid pro quo* for securing project work. *Id.*

Thus, by including the requirement of Kaiser's labor agreement in its bid specifications, the Commonwealth did not affect the intended extent of that regulation. The standard articulated by this Court in *Golden State Transit Corp.* is that state regulation is prohibited "*unless* such [regulation] presumably were contemplated by Congress." 475 U.S. at 614-15 (emphasis added). The "regulation" contested here was clearly contemplated and explicitly authorized by Congress.

The most obvious effect of the decision below, in refusing to recognize that the contested state action was entirely consistent with, and in furtherance of, explicit federal labor policy, is to create a *per se* rule of federal pre-emption: any and all state action that touches upon labor matters is pre-empted. Such a rule, however, is flatly contrary to the teachings of this Court. *See, e.g., Golden State Transit Corp.*, 475 U.S. at 616 (finding pre-emption only when the state has "'[entered] into the substantive aspects of the bargaining process *to an extent Congress has not countenanced*,'" *quoting Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 149 (1976) (emphasis added)).

II.

THE FACTS OF THIS ACTION PRESENT UNIQUE ISSUES THAT CRY OUT FOR FINAL RESOLUTION AND INSTRUCTION BY THIS COURT.

The questions raised by the Court of Appeals' erroneous decision in this action are of critical importance. In 1990, public construction accounted for approximately 25% of all new construction put into place in this country, with a value in excess of $109 billion. [U.S. Department of Commerce, International Trade Administration, *Construction Review, a Bimonthly Industry Report*, March/April 1991, at pp. 1 and 7]. As America's infrastructure undergoes its much needed reconstruction in the coming years, public construction projects will take on even greater importance. And with them, pre-hire agreements and Section 8(e) contracting clauses to help ensure labor stability leading to timely project completion will have an even greater value. As the states are confronted with the enormous task of rebuilding our nation's roads and bridges, it is critical that their projects not be excluded from the benefits and protections of Sections 8(e) and (f).

It is, or should be, equally apparent that the important issues raised by this litigation require a definitive resolution. As the petitioners make clear, pre-hire project agreements—including agreements containing union only contracting provisions—are a way of life in the construction industry on both public and private projects. The brief of the Building and Construction Trades Council of the Metropolitan District offers an impressive, albeit incomplete, listing of public projects for which project agreements like the one in issue here are commonplace. These agreements, including union-only contracting provisions, are so frequently found for two basic reasons: (1) they are believed to promote cost effective, efficient and timely completion of construction projects, particularly by avoiding the costs of construction delays caused by strikes and labor disputes; and (2) they have always been considered by both employers and unions in the construction industry to be equally lawful and enforceable on public and private construction projects. While recent events have done nothing to call into question the first rationale for their use, the second has been seriously undermined by the First Circuit's decision.

Guidance and instruction from this Court are necessary because the resolution of these critical issues are far from self-evident from the First Circuit's decision. Not only have the contractors, unions, and municipalities (and their counsel) on the above-referenced public projects apparently been confused by these difficult issues, but the federal courts have been unable to agree among themselves on the proper resolution of these questions. Over the last six months, these same questions have been addressed by ten federal judges sitting on four different courts. If one were simply counting votes, these issues would be unresolved due to an even split of opinion: five of these judges have found the federal pre-emption doctrine applicable, barring the

contested governmental specifications; five have found federal pre-emption *not* applicable and would allow these specifications.[2]

And there is good reason for this uncertainty. While the amici agree fully with the substantive arguments raised by the petitioners seeking certiorari, they also recognize that the pre-emption issues presented here do not fit squarely into any of the several pre-emption cubbyholes this Court has crafted over the years. The involvement of a public project owner and the interplay of its bidding laws, the state's role as a consumer rather than as a regulator; and the absence of any specific on-going labor dispute all add significantly to the novel nature of these issues. These facts do not permit, for example, the simple application of *Garmon* pre-emption or a reactionary rejection of the *Machinists* doctrine; rather, they call for an analysis of pre-emption not before provided by the Court.

As this Court well knows, the doctrine of federal pre-emption is constantly evolving, with almost every term yielding another piece in this complex puzzle. The facts of this case provide the Court with another opportunity to provide needed refinement and clarification of this doctrine in a context which will have a significant and immediate

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[2]Besides the First Circuit, which split three to two in favor of preemption, other courts considering these same issues in recent months are the U.S. Court of Appeals for the Eight Circuit (two to one in favor of preemption), *Glenwood Bridge, Inc. v. City of Minneapolis*, No. 91-1442, slip op., 137 L.R.R.M. 3001 (8th Cir. August 2, 1991), and the U.S. District Court for the Eastern District of Tennessee (rejecting pre-emption on the basis of DOE involvement), *Phoenix Engineering, Inc. v. MK-Ferguson of Oak Ridge Co.*, No. Civ-3-90-839, slip op. (E.D. Tenn. March 22, 1991). In addition, the U.S. District Court for the District of Alaska, Judge Kleinfeld, has held in an oral opinion that a similar arrangement on a public project was not pre-empted. *ABC v. City of Seward*, No. A91-001 Civil, oral decision (D. Alaska March 19, 1991).

impact on this nation's construction industry for years to come.

CONCLUSION

For the foregoing reasons, we urge the Court to grant the Petitions for Writ of Certiorari.

Dated: September 10, 1991

Respectfully submitted,

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Nos. 91-261 and 91-274

JUN 22 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, PETITIONER

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, INC., PETITIONERS

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

JOINT APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Case #: 90-CV-10576

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND,
Plaintiff

ASSOCIATED BUILDERS AND CONTRACTORS, INC.,
Plaintiff

CONCRETE STRUCTURES, INC.,
Plaintiff

FRASER ENGINEERING COMPANY, INC.,
Plaintiff

PLUMB HOUSE, INC.,
Plaintiff

CHARWILL CONSTRUCTION, INC.,
Plaintiff

CHESTERFIELD ASSOCIATES, INC.,
Plaintiff

v.

WATER RESOURCES AUTHORITY, MASSACHUSETTS, and its Board of Directors in their official and individual capacities,
Defendant

JOHN P. DEVILLARS, Chairman, in his official and individual capacity,
Defendant

JOHN J. CARROLL, Vice Chairman, in his official and individual capacity,
Defendant

LORRAINE M. DOWNEY, Secretary, in her official and individual capacity,
Defendant

ROBERT J. CIOLEK, Member in his official and individual capacity,
Defendant

WILLIAM A. DARITY, Member in his official and individual capacity,
Defendant

ANTHONY V. FLETCHER, Member in his official and individual capacity,
Defendant

CHARLES LYONS, Member in his official and individual capacity,
Defendant

SAMUEL G. MYGATT, Member in his official and individual capacity,
Defendant

THOMAS E. REILLY, JR., Member in his official and individual capacity,
Defendant

WALTER J. RYAN, Member in his official and individual capacity,
Defendant

KAISER ENGINEERS, INC.,
Defendant

THE BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT,
Defendant

DOCKET ENTRIES

Date	No.	Proceedings
3/5/90	1	Complaint for Injunctive and Declaratory Relief and for Money Damages filed (lt) [Entry date 03/06/90]
3/5/90	—	Filing Fee Paid; FILING FEE $120.00 RECEIPT #02364 (lt) [Entry date 03/06/90]
3/5/90	2	Motion by Associated Builders, Associated, Concrete Structures, Fraser Engineering, Plumb House, Inc., Charwill Const, Chesterfield Assoc, Massachusetts Water, Kaiser Engineers, Inc., Building and Const for preliminary injunction (lt) [Entry date 03/06/90]
3/5/90	3	Memorandum of Points and Authorities by Associated Builders, Associated, Concrete Structures, Fraser Engineering, Plumb House, Inc., Charwill Const, Chesterfield Assoc, Massachusetts Water, Kaiser Engineers, Inc., Building and Const in support of [2-1] motion for preliminary injunction (lt) [Entry date 03/06/90]
3/5/90	4	Notice of appearance by Carol Chandler, Mary L. Marshall, Michael Getman for plaintiffs filed. (lt) [Entry date 03/06/90]
3/5/90	5	Motion by Associated Builders for Maurice Baskin to appear pro hac vice (tmm) [Entry date 03/06/90]
3/5/90	6	Affidavit by Concrete Structures Re: [1-1] complaint (tmm) [Entry date 03/06/90]
3/5/90	7	Affidavit by Charwill Const Re: [1-1] complaint (tmm) [Entry date 03/06/90]
3/5/90	8	Affidavit by Associated Re: [1-1] complaint (tmm) [Entry date 03/06/90]

Date	No.	Proceedings
3/5/90	9	Affidavit by Associated Builders Re: [1-1] complaint (tmm) [Entry date 03/06/90]
3/5/90	10	Affidavit by Plumb House, Inc. Re: [1-1] complaint (tmm) [Entry date 03/06/90]
3/5/90	11	Affidavit by Chesterfield Assoc Re: [1-1] complaint (tmm) [Entry date 03/06/90]
3/5/90	12	Affidavit by Fraser Engineering Re: [1-1] complaint (tmm) [Entry date 03/06/90]
3/8/90	13	Motion by Massachusetts Water for reassignment as related case. (tmm)
3/8/90	14	Motion by Associated Builders, Associated, Concrete Structures, Fraser Engineering, Plumb House, Inc., Charwill Const, Chesterfield Assoc for leave to file Memoranda in Support of Motion for P/I exceeding twenty pages. (tmm) [Entry date 03/09/90]
3/9/90	15	Motion by Associated Builders, Associated, Concrete Structures, Fraser Engineering, Plumb House, Inc., Charwill Const, Chesterfield Assoc for assignment of hearing date and agreement to transfer case. (tmm) [Entry date 03/12/90]
3/14/90	16	Notice of attorney appearance for Building and Const by Donald J. Siegel, Paul F. Kelly, Mary T. Sullivan. (tmm) [Entry date 03/15/90]
3/14/90	17	Response by Building and Const to [15-1] motion for assignment of hearing date and agreement to transfer case., [13-1] motion reassignment as related case. (tmm) [Entry date 03/15/90]
3/14/90	18	Notice of attorney appearance for Massachusetts Water by John M. Stevens. (tmm) [Entry date 03/19/90]

Date	No.	Proceedings
3/14/90	19	Response by Massachusetts Water in opposition to [15-1] motion for assignment of hearing date and motion for enlargement of time for the Dfts. to respond to the P's application for a P/I to 4/9/90. (tmm) [Entry date 03/19/90]
3/19/90	20	Notice of filing original affidavits by Associated Builders, Associated, Concrete Structures, Fraser Engineering, Plumb House, Inc., Charwill Const, Chesterfield Assoc (tmm) [Entry date 03/20/90]
3/22/90	21	Response by Associated Builders in opposition to [19-1] opposition response. Oppo. to Motion for Extension of Time and Postponement of Hearing date. (tmm)
3/22/90	22	Motion by Building and Const for leave to file brief in excess of twenty pages. (tmm) [Entry date 03/23/90]
3/22/90	23	Response by Building and Const in opposition to [2-1] motion for preliminary injunction (tmm) [Entry date 03/23/90]
3/22/90	24	Memorandum by Building and Const in opposition to [2-1] motion for preliminary injunction (tmm) [Entry date 03/23/90]
3/22/90	25	Motion by Massachusetts Water for leave to file memo. in excess of twenty pages. (tmm) [Entry date 03/23/90]
3/22/90	26	Response by Massachusetts Water in opposition to [2-1] motion for preliminary injunction and Memo. in opposition. (tmm) [Entry date 03/23/90]
3/22/90	27	Affidavit of Richard D. Fox Re: [26-1] opposition response (tmm) [Entry date 03/23/90]

Date	No.	Proceedings
3/22/90	28	Affidavit of Kenneth M. Willis Re: [26-1] opposition response (tmm) [Entry date 03/23/90]
3/22/90	29	Motion by Massachusetts Water for E. Carl Uehlein, Jr. and James J. Kelley to appear pro hac vice (tmm) [Entry date 03/23/90]
3/23/90	—	Judge Rya W. Zobel. Endorsed Order (tmm)
3/27/90	—	Judge Rya W. Zobel. Endorsed Order granting [13-1] motion reassignment as related case. All parties, except Kaiser Engineers, Inc., having either assented to or having opposition to this motion and after consultation with Judge Mazzone I find that this case is related to C.A. 85-0489-MA, and it is therefore ordered that the Clerk reassign this case to Judge Mazzone. Entered. (tmm)
3/27/90	—	Case reassigned to Judge A. D. Mazzone (tmm)
3/27/90	30	Notice of reassignment of case to Judge Mazzone issued. (tmm)
3/27/90	31	Return of services (3) executed as to Anthony V. Fletcher, Charles Lyons, Thomas E. Reilly Jr. dated 3/7/90 Answer due on 3/27/90 for Thomas E. Reilly Jr., for Charles Lyons, for Anthony V. Fletcher (lt) [Entry date 04/09/90]
3/27/90	32	Return of service executed as to Massachusetts Water, John P. DeVillars, John J. Carroll, Lorraine M. Downey, Robert J. Ciolek, William A. Darity, Samuel G. Mygatt, Walter J. Ryan Jr., Kaiser Engineers, Inc., Building and Const 3/8/90 Answer due on 3/28/90 for Building and Const, for Kaiser Engineers, In, for Walter J. Ryan Jr., for Samuel G. Mygatt, for William A. Darity, for Robert J. Ciolek,

Date	No.	Proceedings
		for Lorraine M. Downey, for John J. Carroll, for John P. DeVillars, for Massachusetts Water (lt) [Entry date 04/09/90]
3/28/90	33	Motion by Individual Defendants John P. DeVillars, John J. Carroll, Lorraine M. Downey, Robert J. Ciolek, William A. Darity, Anthony V. Fletcher, Charles Lyons, Joseph A. MacRitchie, Samuel G. Mygatt, Thomas E. Reilly Jr., Walter J. Ryan Jr. to dismiss (lt) [Entry date 04/09/90]
3/28/90	34	Memorandum by John P. DeVillars, John J. Carroll, Lorraine M. Downey, Robert J. Ciolek, William A. Darity, Anthony V. Fletcher, Charles Lyons, Joseph A. MacRitchie, Samuel G. Mygatt, Thomas E. Reilly Jr., Walter J. Ryan Jr. in support of [33-1] motion to dismiss (lt) [Entry date 04/09/90]
3/28/90	35	Answer to Complaint by defendants Massachusetts Water, Kaiser Engineers, Inc. filed. (lt) [Entry date 04/09/90]
3/28/90	36	Answer to Complaint by defendant Building and Construction Trades Council of the Metropolitan District. (lt) [Entry date 04/09/90]
4/2/90	37	Motion by plaintiffs, Associated Builders, Associated, Concrete Structures, Fraser Engineering, Plumb House, Inc., Charwill Const, Chesterfield Assoc for leave to file reply memo to the Oppos. to ABC's Mtn for PI. (lt) [Entry date 04/09/90]
4/4/90	—	Judge A. D. Mazzone. Endorsed Order granting [37-1] motion for leave to file reply memo (lt) [Entry date 04/09/90]

Date	No.	Proceedings
4/4/90	38	Reply by Associated Builders, Associated, Concrete Structures, Fraser Engineering, Plumb House, Inc., Charwill Const, Chesterfield Assoc to Defendants' Oppositions/response to ABC's Mtn for PI. (lt) [Entry date 04/09/90]
4/4/90	39	Motion of "Amicus Curiae" Attorney General of Mass. for leave to file Mem. Spt. Ds' Position on PI (lt) [Entry date 04/09/90]
4/4/90	—	Judge A. D. Mazzone. Endorsed Order granting [39-1] motion for leave to file Mem. Spt. Ds' Position on PI (lt) [Entry date 04/09/90]
4/4/90	41	Judge A. D. Mazzone. Clerk's Notes: Case called for hearing on P's motion for PI and motion to appear pro hac vice. Motion for PI taken under advisement; Motion to appear pro hac vice is ALLOWED. (mgg) [Entry date 04/10/90]
4/4/90	—	Judge A. D. Mazzone. Endorsed Order granting [5-1] motion for Maurice Baskin to appear pro hac vice [2-1] motion for preliminary injunction taken under advisement (mgg) [Entry date 04/10/90]
4/5/90	40	Memorandum of Amicus Curiae Attorney General of MA in support of Ds' Position of Prel. Relief. (lt) [Entry date 04/09/90]
4/10/90	42	Affidavit by Associated Builders Re: [2-1] motion for preliminary injunction (mgg) [Entry date 04/11/90]
4/10/90	43	Affidavit by Kevin Feeley, Massachusetts Water Re: [2-1] motion for preliminary injunction (mgg) [Entry date 04/11/90]

Date	No.	Proceedings
4/16/90	44	Memorandum by Associated Builders, Associated, Concrete Structures, Fraser Engineering, Plumb House, Inc., Charwill Const, Chesterfield Assoc., in opposition to [33-1] motion to dismiss (lt) [Entry date 04/20/90]
4/16/90	45	Transcript of 4/4/90 Ctrm #4., Mazzone, D.J. hearing filed by Court Reporter Gibbons. (lt) [Entry date 04/20/90]
4/16/90	46	Notice of appeal by Associated Builders, Associated, Concrete Structures, Fraser Engineering, Plumb House, Inc., Charwill Const, Chesterfield Assoc Fee Status: unpaid Appeal record due on 5/16/90 (lt) [Entry date 04/20/90]
4/19/90	47	Motion by Associated Builders, Associated, Concrete Structures, Fraser Engineering, Plumb House, Inc., Charwill Const, Chesterfield Assoc for preliminary injunction pending appeal. (lt) [Entry date 04/20/90]
4/24/90	48	Memorandum by Massachusetts Water, John P. DeVillars, John J. Carroll, Lorraine M. Downey, Robert J. Ciolek, William A. Darity, Anthony V. Fletcher, Charles Lyons, Samuel G. Mygatt, Thomas E. Reilly Jr., Walter J. Ryan Jr., Kaiser Engineers, Inc., Building and Const in opposition to [47-1] motion for preliminary injunction (lt) [Entry date 05/14/90]
4/26/90	—	Certified copy of docket and record on appeal forwarded to U.S. Court of Appeals: [46-1] appeal (lt)
4/27/90	—	Judge A. D. Mazzone. Endorsed Order denying [47-1] motion for preliminary injunction pending appeal. (lt) [Entry date 05/14/90] [Edit date 05/14/90]

Date	No.	Proceedings
4/27/90	49	Judge A. D. Mazzone. Memorandum and Order re Individ. Ds'Mtn to Dismiss and Opp. denying prel. relief . . . Denied . . . . cc/cl. (lt) [Entry date 05/14/90]
4/30/90	50	Response by Building and Const in opposition to [47-1] motion for preliminary injunction (efs) [Entry date 05/14/90]
5/9/90	51	Amended/Subsequent Notice of appeal by Associated Builders, Associated, Concrete Structures, Fraser Engineering, Plumb House, Inc., Charwill Const, Chesterfield Assoc re: [46-1] appeal (amended notice to USCA from U.S. Court's Order denying Ps' Mtn for PI entered 4/11/90, by naming all plaintiffs/appellants in the body and in the caption of the notice) filed. c/s. (lt) [Entry date 05/16/90]
5/16/90	—	Transmitted supplemental record on appeal: [46-1] appeal (lt)
5/17/90	—	Transmitted supplemental record on appeal #47, 48, 49. (sad)
10/24/90	52	Opinion from USCA . . . the decision of the district ct is reversed and mandate shall ensue forthwith with instructions to the dist ct that it issue an order preliminarily enjoining enforcement of Specification 13.1, Reversed and remanded. (mcm) [Entry date 10/26/90]
10/25/90	53	Mandate of USCA Re: [46-1] appeal reversing and remanding to the district court with instructions to issue an order preliminarily enjoining enforcement of specification 13.1. cost to appellants. (mcm) [Entry date 10/26/90]

Date	No.	Proceedings
10/29/90	55	USCA Opinion date 10/29/90 case before Campbell and Torruella . . . Specification 13.1 unduly restricts aspects of the labor mgmt relationship . . . decision of the district court is reversed and mandate shall ensue forthwith w/intruction to the dist ct that it issue an order preliminarily enjoining enforcement of Spec 13.1, Filed. (mcm) [Entry date 11/02/90]
11/1/90	54	Ltr to Judge Mazzone from Carol Chandler and Maurice Baskin re: enclosing a proposed order . . . plt request order be issued expeditiously . . . pltfs also request that order enjoining enforcement of Specification 13.1 be entered as soon as possible, attached proposed order, Filed. (mcm)
11/2/90	56	Memorandum by Massachusetts Water in opposition to Submission with respect to form of order granting P/I, filed c/s. exhibits attached. (mcm) [Entry date 11/08/90]
11/5/90	—	Record on appeal returned from U.S. Court of Appeals: filed this date. (mcm)
11/5/90	57	Judge A. D. Mazzone. Order of the Court Entered Nov 5, 1990, upon consideration of the mtn for clarification of instruction to the Dist Ct and stay or w/d of mandate, and opp thereto, ORDERED the Motion is denied. Mtn for expedited consideration of pending mtn is moot, Filed. (mcm) [Entry date 11/09/90]
11/9/90	61	Judge A. D. Mazzone. Order . . . that Pltf's Mtn for P/I is hereby granted and Dft's are hereby enjoined from enforcing MWRA Bid Specification 13.1 in connection w.the Boston Harbor Wastewater Treatment Project, (mailed to all cnsl D.W.) filed c/s. (mcm) [Entry date 11/20/90]

Date	No.	Proceedings
11/16/90	58	Ltr to Ms. Whitney from J. O'Reilly re: Mtn of A.Welch Corp. filed. (mcm) [Entry date 11/19/90]
11/16/90	59	Motion of Albert J. Welch Corp. to intervene for limited purposes request for oral argument, Filed, c/s. (lt) [Entry date 11/19/90]
11/16/90	60	Affidavit of Robert Mercardo V.P. for intervenor/pty. Albert J. Welch, Re: [59-1] motion to intervene for limited purposes, Filed, c/s. (lt) [Entry date 11/9/90]
11/30/90	62	Response by Associated Builders pltfs., in opposition to [0-0] MWRA's Submission/remark with Respect to Outstanding Contract, Filed, c/s. (lt)
12/7/90	63	Response by Massachusetts Water in opposition to [47-1] motion for preliminary injunction . . . for order enforcing injunction, filed c/s. (mcm) [Entry date 12/10/90]
1/4/91	64	Motion by Massachusetts Water for dissolution of Preliminary Injunction entered on 11/9/90 restraining dfts from enforcing MWRA Bid Specification 13.1 in connection w/Boston Harbor Wastewater Treatment Project., filed c/s. (mcm) [Entry date 01/07/91] [Edit date 01/08/91]
1/7/91	65	Response by Associated Builders in opposition to [64-1] motion for dissolution of Preliminary Injunction and mtn for extension of Injunction pending appeal, filed c/s. (mcm) [Entry date 01/08/91]
1/9/91	—	Judge A. D. Mazzone. Endorsed Order denying [65-1] opposition response, Mtn for extension of injunction DENIED, cc/cl. (mcm)

Date	No.	Proceedings
1/9/91	—	Judge A. D. Mazzone. Endorsed Order granting [64-1] motion for dissolution of Preliminary Injunction . . . ALLOWED. After consideration of the course of this litigation, its affect on the parties and the courts schedule, and the order of the court of Appeals vacating its Jgm I conclude this mtn should be allowed and the status quo restored. Recognizing the uncertainty exisiting the MWRA should consider carefully its interim bidding procedure in order that delay be minimized or avoided when an ultimate decision is rendered by the court of Appeals cc/cl. (mcm)
1/9/91	66	Dft MWRA submission with respect to Mtn for Injunction pending appeal, exhibits attch, filed c/s. (mcm)
1/10/91	68	Order Entered by USCA on 1/10/91 . . . Case remanded to district court for re-entering the injunction that was in effect from 11/9/90 through 1/9/91 pending further order of this court, filed. (mcm) [Entry date 01/11/91]
1/31/91	69	Judge A.D. Mazzone. Order entered . . . Pursuant to the Order entered by the Court of Appeals on 1/10/91, my order of January 9, 1991, is vacated, and the injunction that was in effect from November 9, 1990, through January 9, 1991, is re-entered pending further order of this Court, ISSUED cc/cl. (mcm) [Entry date 02/01/91]
2/1/91	—	Transmitted supplemental record on appeal: entire case file forwarded on supplemental certificate. (kmn) [Entry date 02/04/91]
2/4/91	—	Transmitted supplemental record on appeal: document #69 (kmn) [Entry date 02/07/91]

Date	No.	Proceedings
6/6/91	70	Mandate of USCA Re: reversed and the cause is remanded to the district court for further proceedings consistent with the opinion issued this date. JGM ENTERED ON May 15, 1991, Costs in favor of appellants are taxed at 996.51, filed. (mcm)
9/26/91	—	Terminated document(s) [47-1] motion for preliminary injunction, [33-1] motion to dismiss, [29-1] motion for E. Carl Uehlein, Jr. and James J. Kelley to appear pro hac vice [25-1] motion for leave to file memo. in excess of twenty pages., [22-1] motion for leave to file brief in excess of twenty pages., [15-1] motion for assignment of hearing date and agreement to transfer case. [14-1] motion for leave to file Memoranda in Support of Motion for P/I exceeding twenty pages., [2-1] motion for preliminary injunction Requested by dlw. (lt)
6/4/92	71	Letter from Francis Scigliano, Clerk USCA, requesting that the case file be sent to the Supreme Court of the United States, received. (kmn) [Entry date 06/05/92]

[END OF DOCKET: 1:96cv10576]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 90-CV-10576

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., and ASSOCIATED BUILDERS AND CONTRACTORS, INC., and CONCRETE STRUCTURES, INC., and FRASER ENGINEERING COMPANY, INC., and PLUMB HOUSE, INC., and CHARWILL CONSTRUCTION, INC., and CHESTERFIELD ASSOCIATES, INC., PLAINTIFFS

v.

THE MASSACHUSETTES WATER RESOURCES AUTHORITY and its Board of Directors, JOHN P. DEVILLARS, Chairman, JOHN J. CARROLL, Vice Chairman, LORRAINE M. DOWNEY, Secretary, ROBERT J. CIOLEK, member, WILLIAM A. DARITY, member, ANTHONY V. FLETCHER, member, CHARLES LYONS, member, SAMUEL G. MYGATT, member, THOMAS E. REILLY, JR., member, WALTER J. RYAN, JR., member, in their official and individual capacities, and

KAISER ENGINEERS, INC., and
THE BUILDING AND CONSTRUCTION TRADES COUNCIL
OF THE METROPOLITAN DISTRICT, DEFENDANTS

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF AND FOR MONEY DAMGES

Associated Builders and Contractors of Massachusetts/Rhode Island, Inc. ("ABC Mass"), *et al*, plaintiffs in this matter, by and through counsel, hereby file their Com-

plaint against the above-named defendants, and state as follows:

JURISDICTION

1. This is an action for damages, injunctive and declaratory relief. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1343 and 2201, 15 U.S.C. § 15, and 29 U.S.C. § 1132. The rights sought to be secured in this action arise under 42 U.S.C. §§ 1983 and 1985, 15 U.S.C. § 1, *et seq.*, 29 U.S.C. § 151, *et seq.* and § 1001, *et seq.* Plaintiffs also seek to vindicate their due process and equal protection rights guaranteed by the Fourteenth Amendment to the United States Constitution. Plaintiffs also pray for relief on related state claims under the doctrine of pendent jurisdiction.

VENUE

2. The unlawful conduct and actions complained of herein have been, are being, and (absent the prayed for relief) will be committed within the District of Massachusetts, and will affect the interstate trade and commerce being conducted within the District of Massachusetts. All of the defendants, reside, do business, or may be found therein.

NATURE OF CONTROVERSY

3. The focus of this action is an unlawful bid specification which is being imposed upon all successful bidders and subcontractors on construction projects being advertised for bids in connection with the $6.1 billion Boston Harbor clean-up. The Massachusetts Water Resources Authority ("the MWRA") is requiring that all successful bidders and subcontractors agree to be bound by the Boston Harbor Wastewater Treatment Facilities Agreement (the "Agreement") which requires that such bidders and subcontractors recognize the Defendant Building Trades Council and its affiliated local unions as the exclusive representatives of all employees working on the

Harbor clean-up. The Agreement is attached hereto as Exhibit A. The Agreement further requires that bidders and subcontractors agree to be bound by numerous terms and conditions of employment for their employees, including compulsory union dues, hiring halls, restrictive work rules and numerous employee benefit plans different from those presently in effect at the employers' workplaces.

4. As set forth in this Complaint, the restrictions contained in the MWRA's bid specifications are unreasonable, unlawful and anti-competitive. They constitute unlawful state regulation of private collective bargaining and employee benefits in violation of the National Labor Relations Act and the Employee Retirement Income Security Act. They deprive plaintiffs of equal protection and due process of law under the United States Constitution. They unreasonably restrict competition in violation of the antitrust laws. Finally, the MWRA's restrictions violate the Commonwealth's procurement laws and other state constitutional, statutory and common law rights of the plaintiffs.

5. Approximately 75% of all construction work in this country is performed on a non-union basis. Only 21% of all employees in the construction industry are union members. Non-union employers and employees have found that they can perform high quality construction work at lower costs, with greater flexibility and freedom than by operating under union agreements. The effect of the MWRA Agreement, however, is to force the plaintiffs and other non-union contractors to abandon those principles in order to obtain work on this Project. The anti-competitive Agreement and the specifications incorporating it into all Project advertisements for bids are contrary to the public interest and will deprive the Commonwealth of the benefits of full and open competition in the procurement process. The unlawful restrictions will cause further irreparable harm to the plain-

tiffs and their Merit Shop members by depriving them of the opportunity to participate in the largest public works project in New England history.

6. Accordingly, plaintiffs seek to enjoin enforcement of the unlawful restrictions contained in the Agreement and the bid specifications incorporating the Agreement on all contracts that have been advertised but not yet awarded and on all future construction projects connected with the clean-up of Boston Harbor. Plaintiffs do not seek in any way to delay or hinder the clean-up project itself. Plaintiffs seek only to enjoin continued enforcement of the restrictions which the MWRA, in conjunction with Kaiser and the Council, is unlawfully imposing on those who seek to participate in this important project. Plaintiffs also seek such other relief as the Court deems appropriate.

PARTIES

7. Plaintiff ABC National is a national trade association of over 18,000 merit shop construction contractors, that is, those contractors that use both union and non-union labor. Since its founding in 1950, it has been the objective of ABC National, its local chapters and their member companies to provide high quality, low cost, and timely construction work, which benefits businesses, consumers, and taxpayers.

8. Plaintiff ABC Mass is a local chapter of ABC National and is a Massachusetts non-profit corporation organized pursuant to the ABC National bylaws. ABC Mass represents over 500 contractors in Massachusetts alone. Many of ABC Mass' members perform work of the type required under the Harbor clean-up project and would bid on this project but for the unreasonable, anti-competitive and unlawful restrictions which have been imposed by defendants. ABC Mass is filing this action on behalf of its individual members who have been and will continue to be injured by the loss of business oppor-

tunity resulting from enforcement of the Agreement and the MWRA specifications.

9. Concrete Structures, Inc. ("Concrete Structures") is a Massachusetts corporation authorized to do business in Massachusetts. Fraser Engineering Company, Inc. ("Fraser Engineering") is a Massachusetts corporation authorized to do business in Massachusetts. Plumb House, Inc. ("Plumb House") is a Massachusetts corporation authorized to do business in Massachusetts. Charwill Construction, Inc. ("Charwill") is a New Hampshire corporation authorized to do business in Massachusetts. Chesterfield Associates, Inc. ("Chesterfield") is a New York corporation authorized to do business in Massachusetts. Absent the unreasonable, anti-competitive and unlawful restrictions imposed by defendants, ABC member companies including, but not limited to Concrete Structures, Fraser Engineering, Plumb House, Charwill and Chesterfield would bid on projects covered by the bid specifications which are the subject of this litigation.

10. Defendant MWRA is a body politic and corporate and public instrumentality of the Executive Office of Environmental Affairs of the State of Massachusetts created by the Massachusetts Water Resources Authority Act, Mass. Gen. Laws, c. 92, App. § 11 *et seq.* (as amended 1987) ("the MWRA Act"). The MWRA is deemed a public agency under the Act and subject to the Commonwealth's General Laws including its public bidding laws. *See* MWRA Act § 1-8(g).

11. Defendant John P. DeVillars is Chairman of the MWRA Board of Directors ("the Board"). Defendant John J. Carroll is Vice Chairman of the Board. Defendant Lorraine M. Downey is Secretary of the Board. Defendants Robert J. Ciolek, William A. Darity, Anthony V. Fletcher, Charles Lyons, Joseph A. MacRitchie, Samuel G. Mygatt, Thomas E. Reilly, Jr. and Walter J. Ryan, Jr. are Board members. Defendant Devillars is Secretary of the Executive Office of Environmental Af-

fairs of the Commonwealth of Massachusetts. The remaining Board members were appointed by the mayors of the cities and towns within the MWRA's jurisdiction. Defendant Ryan is currently Business Agent and Treasurer of Local 4 of the International Union of Operating Engineers, AFL-CIO ("Engineers Local 4") a member union of the defendant Council. Plaintiffs bring this action against the defendant Board members in both their official and individual capacities.

12. Kaiser Engineers, Inc. ("Kaiser"), is a general contractor with offices in Boston, Massachusetts. Kaiser is the "Project Contractor" under the Boston Harbor Wastewater Treatment Facilities Agreement at issue in this action.

13. The Building and Construction Trades Council of the Metropolitan District ("the Council") is a voluntary, unincorporated association whose principal place of business is located in Boston, Massachusetts. ("The Council" shall refer to both the Council itself and/or its member unions). The Council was organized and is operated as an association of labor unions for the purpose of carrying on collective bargaining and labor relations with numerous employers engaged in the construction industry in and around the Boston metropolitan area.

14. On information and belief, various other entities and individuals, not named as defendants, participated as co-conspirators with or agents of defendants in the violations alleged herein.

FACTUAL BACKGROUND

15. In 1984, the Massachusetts state legislature enacted the Massachusetts Water Resources Authority Act in order to provide water supply services and sewage collection, treatment, and disposal services to those cities and towns in the eastern half of the Commonwealth previously served by the Metropolitan District Commis-

sion. The statement of purpose of the MWRA Act references "[t]he preservation and improvement of the health, welfare, and living conditions of the citizenry, the promotion and enlargement of industry and employment and all other aspects of commerce. . . ." MWRA Act § 1-1(a).

16. The MWRA Act authorizes the MWRA to borrow up to $65 million from the Commonwealth of Massachusetts. MWRA Act § 1-5(c). The MWRA Act further provides that the Commonwealth may guarantee notes issued by the MWRA in an aggregate amount of up to $600 million. MWRA Act § 1-5(e).

17. The MWRA has received and is scheduled to receive federal monies under various grant programs as well as a special federal grant of over $100 million from the Section 513 Program. *See* The Water Quality Act of 1987, Pub. L. 100-4, 101 Stat. 7 (1987). Under the Section 513 Program, Congress earmarked federal funds for the Boston Harbor clean-up. The MWRA is also funded by sizable state grants and substantial state revenues. The bulk of the MWRA's currently scheduled construction activities will take place over the next five years. The MWRA began operations in 1985.

18. In 1983, the United States and the Conservation Law Foundation of New England, Inc. brought separate civil actions against the MWRA's predecessor, the Metropolitan District Commission ("MDC"), to compel the clean-up of Boston Harbor pursuant to the Federal Clean Water Act, 33 U.S.C. § 1251, *et seq.* ("the Clean Water Act"). The United States and the Conservation Law Foundation alleged violations of the Clean Water Act by the MDC, the Commonwealth of Massachusetts, the MWRA, and the Boston Water and Sewage Commission. By Order of this Court, it was found that the MWRA, as successor to the MDC, was liable for certain violations of the Clean Water Act. The Court also found that there

was a need for expeditious remedial action to abate the ongoing discharge of sludge and inadequately treated sewage into the Boston Harbor. Accordingly, on December 23, 1985, this Court entered an interim Order to ensure that initial steps would be undertaken to promptly abate the discharge of pollutants into the Harbor and other affected waterways. Through this December 23, 1985 Order, the Court established a schedule of remedial steps to be undertaken by the MWRA to assure compliance with the requirements of the Clean Water Act. In response to this Order, the MWRA embarked upon a multi-phase $6.1 billion, ten-year clean-up program ("the Project"). The Project is under the continuing supervision of this Court.

19. Section 1-6(g) of the MWRA Act authorizes the MWRA to engage the services of engineers, architects and other professionals. Prior to embarking upon this massive clean-up program, the MWRA appointed a Project Contractor, defendant Kaiser, to oversee the construction of new treatment facilities and the upgrading of existing facilities as required to effect the clean-up.

20. On or about November 9, 1988, Pipefitters Local 537 and Sheet Metal Workers Local 17 (both members of defendant Council) set up pickets at one or more Project work sites. This picketing resulted in a work stoppage until the picketing terminated on November 14, 1988. Thereafter, Kaiser, acting on behalf of the MWRA, negotiated with the Council and executed the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement on May 22, 1989.

21. Although the Agreement is ostensibly one between the Unions and the construction Project Contractor, Kaiser, Kaiser is expressly noted to be acting "on behalf of" the MWRA. *See* Agreement Caption, p.i., Specification 13.1, *infra*. In addition, press reports make clear that MWRA officials were actively involved in negotiating the Agreement. *See The Boston Globe*, "MWRA no-strike

pact made by unions," pp. 17, 21 (May 31, 1989), attached hereto as Exhibit B.

22. The MWRA subsequently began advertising for bids on a series of construction projects which are necessary to complete the Project. In January 1990, the MWRA was scheduled to advertise for bids on the inter-island tunnel and shafts, the effluent outfall shaft and the effluent outfall tunnel and differentials, the pilot plant, the Deer Island interim switchgear, the construction support building, road maintenance and snow removal, and the fuel depot. In February, the MWRA was scheduled to advertise for bids for power distribution, the construction water system and the construction power distribution system. This month, the MWRA is scheduled to solicit bids for construction of the on-shore marine transportation facility at Mystic River. Numerous additional projects will be bid and awarded in the months and years to come.

23. In soliciting Project bids, the MWRA has promulgated detailed specifications. Specification 13.1 of the Massachusetts Water Resources Authority Advertisement for Bids Instructions (hereinafter "Specification 13.1") provides in part:

> In the interest of [labor] harmony and the long-term supply of skilled manpower, each successful bidder and any and all levels of subcontractors, as a condition of being awarded a contract or subcontract, will agree to abide by the provisions of the Boston Harbor Waste Water Treatment Facilities Project Labor Agreement as executed and effective May 22, 1989, by and between Kaiser Engineers, Inc., on behalf of the Massachusetts Water Resources Authority . . . A copy of the Agreement is attached and included as part of these Contract Documents. The attachments (Schedule A's and B's) are not attached to the Agreement but are incorporated by reference as if fully set forth.

Specification 13.1, attached as Exhibit C.

24. Each of the bid specifications for all Project construction contracts, including those referenced in Paragraph 22, contains the requirement that all successful bidders and subcontractors on Project work must be willing to execute and comply with the Agreement after they are awarded a construction contract. The Agreement itself states that it will be incorporated in all future Project specifications. Agreement, Art. III.

25. The Agreement which successful bidders and subcontractors are required to sign (*see* Agreement, p.1) requires, *inter alia*, that: Successful bidders under the Agreement must recognize the Council as the sole and exclusive bargaining representative of all craft employees working on facilities within the scope of the agreement. Art. III, § 1. All employees for Project work must be referred to Project contractors by local union hiring halls. Art. III, §§ 2, 3. Furthermore, all employees covered by the Agreement are subject to the unions' compulsory membership provisions and Schedules A and B of the Agreement. Art. III, § 4.

26. A prefatory Note on the cover page of the Agreement incorporates by reference all the collective bargaining agreements of the Council. Schedule A's are the local collective bargaining agreements. Schedule B's are the collective bargaining agreements covering Engineers Local 4, Laborers Local 88, and Electrical Workers Local 103. These unions have jurisdiction over Project tunnel work under the Agreement. The Agreement creates a dispute and grievance mechanism whereby aggrieved employees must seek redress through the Union. *See* Art. VII. Project employees are governed by the work rules, job classifications and wage and benefit provisions contracted for by the Council's affiliated unions. *See* Art. IX.

27. Article XI, Section 1 provides that "[t]he Contractor may utilize apprentices and such other appropriate

classifications as are contained in the applicable Schedule A or B, in a ratio not to exceed 25% of his work force by craft. . . ."

28. Article XI, Section 2 provides that any contractor awarded a Project bid "agrees to pay contributions to the established employee benefit funds in the amounts designated in the [Council member union's] Schedule A. . . ."

29. There have been no judicial or administrative hearings or findings supported by substantial evidence to the effect that non-union contractors are incapable of performing Project work in accordance with the expeditious pollution abatement mandate of the MWRA Act. There have been no findings supported by substantial evidence that the Agreement's provisions are narrowly drawn so as to avoid unnecessary interference with the rights of non-union contractors and their employees. Moreover, to the extent that any threat of "disharmony" is alleged to exist in the absence of the Agreement, such threat has arisen solely from unlawful efforts by the defendant Council to prevent non-union contractors and their employees from participating in the clean-up of the Harbor. Plaintiffs stand ready to work "in harmony" with Council members, and ABC members have performed work on thousands of public and private jobs around the country and in Massachusetts with no disruption whatsoever, on time and at low cost.

30. ABC Mass member companies, including Concrete Structures, Plumb House and companies affiliated with other ABC chapters and companies such as Charwill, Chesterfield and Fraser Engineering, are prepared to bid on one or more of the specific Harbor clean-up projects including those referenced in Paragraph 22, which have been (or will soon be) advertised for bids; these companies have not actually bid the Project because of the unreasonable restrictions incorporated in Specification 13.1, *e.g.*, that all bidders must agree to recognize the

Unions as their employees' collective bargaining representative and must agree to abide by the Agreement. One or more ABC companies is prepared to bid on much of the future work on the Boston Harbor clean-up project.

31. On September 21, 1989, plaintiff Fraser Engineering Co. filed a protest with the Massachusetts Department of Labor and Industries ("the Department") challenging the legality of the Agreement. By letter opinion dated February 16, 1990, the Department rejected the protest, upholding the validity of the Agreement. (The Department's opinion is attached hereto as Exhibit D).

32. It is clear from this opinion, and from the face of the Agreement and the specifications which have issued to date, that absent judicial relief all future projects related to the Boston Harbor clean-up will contain the restrictive Agreement-related specification (Specification 13.1).

FEDERAL CLAIMS

COUNT I

VIOLATION OF THE NATIONAL LABOR RELATIONS ACT

33. Paragraphs 1-32 are incorporated herein by reference.

34. Section 7 of the National Labor Relations Act ("NLRA") provides that "Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively *through representatives of their own choosing*, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right *to refrain from any or all of such activities . . .*" 29 U.S.C. § 157 (emphasis added). Sections 8 and 9 of the NLRA give employers the right to deal only with unions who represent a majority of their employees, and prohibit both employers and unions from interfering with employees in the exercise of their Section 7 rights.

35. Although Section 7 gives employees the right *not* to join a union and to bargain through representatives of their own choosing, the Agreement and the MWRA's bid specifications effectively require employees of ABC member companies to join a union, not of their choice, in order to work on the Project. The Agreement and bid specifications further coerce employers to abandon their Section 8 and Section 9 rights to deal only with a lawfully elected union representing a majority of the employer's employees.

36. Section 1-8(g) of the MWRA enabling Act provides that the MWRA shall be deemed a public agency. This public agency and its agent, Kaiser, have impermissiby promoted the interests of select labor organizations (those party to the Agreement) by effectively forcing all would-be Project bidders to recognize and deal with the

defendant Council's member unions in order to perform Project contracts. This action is not authorized under the NLRA, 29 U.S.C. § 151 *et seq.*, which preempts such state regulation of labor-management relations. Thus, the Agreement amounts to an impermissible attempt by the Commonwealth to promote or permit activity prohibited under the NLRA and to regulate labor relations that are beyond the Commonwealth's power to regulate under the NLRA, i.e., areas of labor conduct that Congress intended to leave unregulated.

37. The Agreement and bid specifications further result in state intrusion into substantive aspects of labor agreements and the collective bargaining process by involuntarily binding the plaintiff employers to the terms of the Agreement; these terms include, but are not limited to, a hiring hall provision, compulsory union dues and dues checkoff, grievance and binding arbitration procedures, health and welfare, pension and other trust fund contributions, apprenticeship funds and ratios, and restrictive work rules and job classifications.

38. Each of these terms and conditions of employment is a subject of bargaining under the NLRA and its subject to exclusive regulation by federal law. The Agreement impermissibly alters the balance of economic factors between non-signatory contractors and the defendant Council's member unions by requiring the contractors to accept the terms of the Agreement in order to perform work on the Project.

39. Many of plaintiffs' employees have chosen not to belong to or be represented by a labor organization. By imposing the Agreement's terms upon these employees, the defendants have deprived the plaintiffs of rights protected under the NLRA, including the right to refrain from union membership and to negotiate individual terms and conditions of employment.

40. The Agreement and bid specifications constitute impermissible state regulation of private labor relations

under Sections 7, 8 and 9 of the NLRA. Through the Agreement and Specification 13.1 the Commonwealth is affecting the substantive aspects of the free collective bargaining process to an extent forbidden by the NLRA which threatens to undermine the policies underlying the comprehensive labor relations law embodied in the NLRA.

COUNT II

VIOLATION OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

41. Paragraphs 1-40 are incorporated herein by reference.

42. The MWRA and its agent, Kaiser, through the Agreement and bid specifications, purport to require successful bidders and their subcontractors to contribute to specified employee benefit funds, including pension, annuity, health and welfare, vacation, apprenticeship and training funds and trusteed fringe benefit plans and trust agreements, and to participate in an apprenticeship program for contractor employees.

43. In order for an ABC member company to obtain an award under the Project, it would have to agree to be bound by the Agreement, including the myriad benefits, funds and programs established therein. Thus, the Agreement amounts to an attempt by the Commonwealth (through the MWRA and its agent, Kaiser) to regulate and dictate the terms of the employee benefit plans of all successful bidders on the project.

44. ERISA preempts "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). Employee benefit plans are defined as "any plan, fund, or program which . . . is hereafter established or maintained by an employer or by an employee organization, or by both, to

the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services . . . or pension plan." 29 U.S.C. § 1002 (1) (2).

45. Section 13.1 of the MWRA bid specifications and the Agreement itself clearly "relate to" employee benefits and are being imposed under color of state law. Specification 13.1 is directly inconsistent with ERISA and is, therefore, preempted.

COUNT III

VIOLATIONS OF 42 U.S.C. § 1983/EQUAL PROTECTION

46. Paragraphs 1-45 are incorporated herein by reference.

47. Plaintiffs are entitled to relief under 42 U.S.C. § 1983. Acting under color of state law, defendants engaged in conduct with the knowledge that such conduct would have the effect of denying plaintiffs' Fourteenth Amendment equal protection rights. Defendant Board members acted in both their official and individual capacities in causing these injuries.

48. In negotiating and executing the Agreement, Kaiser acted on behalf of, and as the agent of, the MWRA, a Massachusetts state authority, which subsequently incorporated the Agreement into its project bid specifications. Substantial state funds are being used to finance the Project and the Commonwealth has guaranteed repayment of notes issued by the MWRA. Both

Kaiser and the MWRA are performing functions under the Agreement that are traditionally performed by the state.

49. Although no Massachusetts law authorizes discrimination against merit shops in the procurement process underlying the Project, the Agreement and the bid specifications executed on behalf of the MWRA have the effect of precluding the award of Project work to merit shop contractors as a class. This unequal treatment is without a rational basis in that merit shop contractors possess the requisite skill, ability and integrity and are fully capable of providing the continuous, "harmonious" construction services required for a timely, thorough and cost-effective clean-up of Boston Harbor. *See* Mass. Gen. Laws Ch. 149, § 44A. No hearings were held, nor were any findings supported by substantial evidence made, to the contrary.

50. In any event, the Agreement could have been more narrowly drawn to achieve any legitimate objectives without unlawfully requiring any bidders to agree to union representation or union terms or conditions of employment.

51. As a result of the continuing arbitrary, capricious and unlawful conduct of the defendants evidenced by the Agreement and Specification 13.1, plaintiffs have sustained and continue to sustain damages resulting from the violation of their Fourteenth Amendment equal protection rights.

COUNT IV

VIOLATIONS OF 42 U.S.C. § 1983/DUE PROCESS

52. Paragraphs 1-51 are incorporated herein by reference.

53. Acting under color of state law, defendants engaged in conduct with the knowledge that such conduct

would have the effect of denying plaintiffs' Fourteenth Amendment due process rights. Defendant Board members acted in both their official and individual capacities in causing these injuries.

54. Numerous ABC member companies (and unaffiliated companies) such as Charwill, Chesterfield, Concrete Structures, Plumb House and Fraser Engineering stand ready, willing, and able to bid and to perform construction services on the Project. Because of the unreasonable restrictions imposed by the defendants, however, plaintiffs have been deprived of an opportunity to obtain work on the Project. Plaintiffs are unable to obtain the award of contracts as the lowest responsible and eligible bidders. The state action embodied in the Agreement denies plaintiffs a property interest in contract awards without due process of law in violation of the Fourteenth Amendment.

55. As a result of the continuing arbitrary, capricious and unlawful conduct of the defendants evidenced by the Agreement, plaintiffs have sustained and continue to sustain damages resulting from the violation of their Fourteenth Amendment due process rights.

COUNT V

VIOLATIONS OF ANTITRUST LAWS

56. Paragraphs 1-55 are incorporated herein by reference. The parties to the Agreement expressly note that this $6.1 billion, ten year clean-up Project "should provide significant employment opportunities for qualified residents of the area served by the [MWRA]." Agreement Art. XI, § 2.

57. Through the artifice of the Project Agreement, the Council, Kaiser, and the MWRA have entered into a conspiracy to restrain free competition and interstate commerce by imposing the Agreement on all prospective, successful construction bidders and subcontractors. The con-

spiracy manifest in the Agreement effectively excludes from the bidding process all those merit shop contractors (constituting approximately 70% of the industry) whose employees do not wish to be represented by a labor union, or who prefer to deal only with a union designated by a majority of their employees.

58. Defendants executed the Agreement as part of a general scheme to reduce competition and eliminate merit shop contractors from the Boston area. Defendants, labor and non-labor groups, at all times relevant to the allegations set forth herein were acting as the agents and or co-conspirators of each other, with a common anti-competitive purpose or design. The MWRA and Kaiser also acquiesced to threats, intimidation and coercion employed by the Council and/or its member unions to secure the Agreement. Defendants' activities and conduct have had and continue to have a substantial impact on interstate commerce in violation of 15 U.S.C. § 1.

59. The effect of defendants' unlawful conduct has been to prevent merit shop contractors from bidding the Project and thus threatens to reduce competition and substantially raise the price of the Project.

60. As a result of defendants' unlawful conduct, plaintiffs have been and will be injured in their businesses, property, and person in that they have suffered and will continue to suffer substantial injury to the goodwill of their businesses, lost business opportunities, and the loss of profits and of employment.

61. Neither the MWRA nor its agent, Kaiser, enjoy absolute or qualified immunity with respect to their participation in the anti-competitive activities described in this Complaint. The Agreement does not comport with the sovereign policies of the Commonwealth of Massachusetts. The plain language and legislative history of the MWRA enabling statute reveal the fact that the Massachusetts state legislature neither authorized nor ap-

proved the anti-competitive restrictions contained in the Agreement. *See* Statement of Purpose, MWRA Act § 1-1.

62. Section 1-8(g) of the Act provides that the MWRA shall be subject to sections 44(A)-(H) of Chapter 149 of the Massachusetts General Laws. These sections set forth the mechanisms for bidding on public projects and require that contracts be awarded to the "lowest responsible bidder". The Agreement contravenes these policies by imposing an anti-competitive restriction on the award of contracts. Thus, the MWRA's conspiratorial, anti-competitive conduct is *ultra vires* in that no state policy expressly or impliedly authorizes a "union-only" restriction on the award of contracts on this or any other public project.

63. The Agreement does not reserve to any Commonwealth officials the right to supervise the parties' conduct under the Agreement, including the right to review and disapprove anti-competitive acts committed by such parties. The presence of private interests on the Board of Directors of the MWRA, including an executive of one of the defendant Council's member unions, highlights the fact that the Agreement is not a product of considered state policy, but rather is a product of concerted anti-competitive activity instigated by the Council and or its members.

64. The Council member unions are not exempt from the antitrust laws. The Council engaged in coercive conduct and entered into a conspiracy with Kaiser and the MWRA, both non-labor organizations, in order to restrain competition by restricting the award of contracts or subcontracts to those bidders who agree to sign the Agreement. The challenged conduct was not in the unions' self-interest and was not part of a labor dispute. The Council entered into this conspiracy despite the fact that none of its member unions had a collective bargaining relationship with the MWRA, Kaiser, or with any of the plaintiffs and

neither Kaiser nor the MWRA is acting as a construction industry employer on this Project.

65. The precise amount of injury which plaintiffs have sustained and will have sustained at the time of trial cannot be presently ascertained because defendants' violations, and consequently plaintiffs' injuries flowing therefrom, are continuing.

PENDENT STATE CLAIMS

COUNT VI

VIOLATION OF MASSACHUSETTS PUBLIC BIDDING STATUTE

66. Paragraphs 1-65 are incorporated herein by reference.

67. Massachusetts Gen. Laws ch. 30, § 39M sets forth the bidding procedures for public works projects. The public building project bidding procedures are set forth in Mass. Gen. Laws Ch. 149 §§ 44A-44L. Both public statutes require that contract awards be made to the lowest responsible and eligible bidder.

68. The MWRA and its agent, Kaiser, are violating the provisions of the competitive bidding statutes by requiring that successful, non-union bidders, sign and abide by the Agreement as a prerequisite to receiving (or retaining) a contract award.

69. The MWRA's and Kaiser's actions have been arbitrary, capricious, discriminatory, and contrary to the provisions of the applicable Massachusetts bidding statutes.

70. In insisting that award recipients adhere to the Agreement, the MWRA and its Board members have acted in bad faith, abused their official power and discretion, and unlawfully promoted favoritism and collusion.

COUNT VII

MASSACHUSETTS CONSTITUTIONAL AND CIVIL RIGHTS VIOLATIONS

71. Paragraphs 1-70 are incorporated herein by reference.

72. Articles I, X, and XII of the Declaration of Rights of the Constitution of the Commonwealth of Massachusetts protect plaintiffs in the enjoyment of their liberty and property including the right to engage in their lawful occupations. Plaintiffs are also entitled to equal protection under the laws of the Commonwealth under Article X.

73. Plaintiffs' exercise and enjoyment of their rights under the constitution of the Commonwealth has been interfered with in violation of the Massachusetts Civil Rights Act, Mass. Gen. Laws Ch. 12, §§ 11H & I, in that the MWRA and Kaiser are depriving plaintiffs of the opportunity to work on the Project absent Plaintiff's willingness to sign the Agreement. In addition, the Council has intentionally interfered with plaintiffs' constitutional rights by foisting the Agreement upon the MWRA and Kaiser through threats and intimidation, in order to assure union-only performance of the Harbor clean-up. Defendants, at all times relevant to the allegations set forth herein, were acting as the agents and/or co-conspirators of each other with a common anti-competitive purpose or design. In this manner, defendants deprived plaintiffs' employees of their right to engage in their lawful occupations and deprived plaintiffs of their right to conduct their businesses.

COUNT VIII

TORTIOUS INTERFERENCE WITH ADVANTAGEOUS BUSINESS RELATIONSHIPS

74. Paragraphs 1-73 are incorporated herein by reference.

75. Defendant Council and Kaiser intentionally interfered by unlawful means with plaintiff ABC member companies' ability to form advantageous business relationships with the MWRA by procuring the MWRA's refusal to contract with plaintiffs and those similarly situated through execution of the Agreement, which violates the Massachusetts public bidding laws and unlawfully limits competition.

COUNT IX

REQUEST FOR INJUNCTIVE RELIEF

76. Paragraphs 1-75 are incorporated herein by reference.

77. Plaintiffs will suffer irreparable harm if the defendants are allowed to proceed under the Agreement.

78. Plaintiffs are not seeking to stop or delay the Boston Harbor clean-up project. Plaintiffs merely seek to enjoin enforcement of the unlawful bid specifications incorporating the unlawful Agreement, to the extent that it requires ABC member companies to recognize and deal with non-representative unions and to be bound by the terms and conditions of the union agreements; Plaintiffs also seek such other relief as the Court deems just and proper. No significant harm will result to either the public or to interested parties in the event the requested relief is granted.

79. Plaintiffs have no adequate remedy at law, and this request for injunctive relief is the only means of securing effective relief in the form of access to the construction projects required for the $6.1 billion, ten year clean-up project.

WHEREFORE, plaintiffs pray for relief as follows:

1. Money damages, including treble the amount of damages found to have been sustained by plaintiffs as a result of defendants' unlawful conduct under 15 U.S.C. § 1; and

2. Reasonable costs, interest and attorneys' fees in bringing and prosecuting this action pursuant to 42 U.S.C. § 1988, the Massachusetts Public Statute and other applicable laws; and

3. A judgment declaring that the Agreement:

(A) is null and void as preempted by the NLRA and ERISA to the extent that it requires ABC members to recognize and deal with non-majority representative unions and to be bound by the terms and conditions of employment set forth in the Agreement;

(B) works a denial of plaintiffs' rights to equal protection and due process in contravention of 42 U.S.C. § 1983 the Massachusetts Civil Rights Act, and the federal and state constitutions;

(C) is unenforceable as against the plaintiffs and ABC member companies;

(D) is violative of Massachusetts procurement regulations; and

4. A preliminary and permanent injunction against the defendants and their agents, employees, successors, attorneys, and all those acting in concert or in participation with them, prohibiting enforcement against plaintiffs or other ABC member companies of bid Specification 13.1 and those portions of the Agreement which would require plaintiffs to recognize or deal with any union or to adhere to any collectively bargained terms or conditions of employment; and

5. Such other relief as the Court deems appropriate.

PLAINTIFFS HEREBY DEMAND A TRIAL BY JURY ON ALL ISSUES TRIABLE TO A JURY IN THIS MATTER.

Respectfully Submitted,

ASSOCIATED BUILDERS AND CONTRACTORS, *et al.* OF MASSACHUSETTS/ RHODE ISLAND

By their attorneys,

/s/ Carol Chandler
CAROL CHANDLER
MARY L. MARSHALL
MICHAEL GETMAN
STONEMAN, CHANDLER & MILLER
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/s/ Maurice Baskin
MAURICE BASKIN
THOMAS J. MADDEN
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(202) 962-4800

Dated: March 5, 1990

EXHIBIT B

Boston Globe
May 31, 1989

MWRA NO-STRIKE PACT
MADE BY UNIONS

By Peter J. Howe
Globe Staff

The Massachusetts Water Resources Authority and 31 construction unions yesterday announced an agreement to ban strikes and avoid labor unrest during the decade-long harbor-cleanup project.

The agreement was hailed by both sides as a landmark accomplishment in labor relations that will prevent delays and cost overruns in the $6.1 billion project. But the pact makes only a vague commitment to expanding the project's job opportunities for minorities and women.

In a related development yesterday, Mayor Flynn called on the state to earmark one-third to one-half of the trainee jobs in the harbor-cleanup and Central Artery-third tunnel construction projects for those he called disadvantaged young adults aged 18 to 29.

After heavy lobbying from Flynn, artery-tunnel officials last month agreed to reserve 25 percent of the apprentice jobs for people in each of three categories: women, minorities and Boston residents. Flynn now says the state needs to target the construction job opportunities more directly "toward young people caught in the cycle of poverty." Flynn said the state's three affirmative-action categories may not reach those most in need.

The MWRA labor-harmony pact, announced at a State House news conference, bans strikes or slowdowns by the

unions and lockouts by contractors. It will prevent work stoppages during the five contract renegotiations that will occur during the life of the project.

The agreement sets standard procedures for working conditions, including paying workers an extra hour's pay for the time they spend traveling from shore to construction sites at Deer Island and elsewhere.

Also, the former US secretary of labor, John Dunlop, has been appointed as arbitrator to resolve disputes among trade unions and between the MWRA and organized labor.

Minorities express concern

However, some minority leaders expressed concern that the new MWRA pact has none of the specific guarantees —like those made for the $4.4 billion artery-tunnel project—reserving jobs for minorities and women.

Asked about the MWRA agreement, Joseph W. Nigro, secretary-treasurer of the Building Trades Council, said: "There are no numbers on this contract."

But MWRA executive director Paul F. Levy said the agreement "establishes the commitment of the MWRA and the building trades to work together on that agreement.

Levy said specific numerical targets will be announced in several months. He said: "The kinds of numbers the Central Artery is talking about is what we're looking towards."

Rep. Gloria Fox (D-Roxbury) last night expressed concern that the MWRA has not yet offered detailed affirmative-action promises.

"We need to make sure we have as much as we can in print, because our concern is that we're really going to fall behind on the hiring of African-American men and women on this project," Fox said.

Levy said the artery-tunnel goals cannot be the same as those for the harbor cleanup because all the artery work is occurring within Boston neighborhoods while the MWRA serves 42 cities and towns and will have major construction in communities other than Boston.

All unions signed

Nigro said all unions that will be working on the project—which includes construction of the world's second-largest sewage-treatment plant and 14 miles of tunnels under Boston Harbor—have signed the no-strike pledge. The agreement holds through 1999.

Nigro acknowledged that the plan does involve major concessions by the trade unions, particularly the no-strike clause. But, he said, the unions believe they will benefit from the "10 years of stability," allowing them to make long-term plans for recruiting and training new members.

Arthur Osborn, the executive secretary of the Greater Boston Labor Council, said, "I agree it's a landmark. Ten years of labor harmony is certainly a step in the right direction."

Levy called the agreement a major cost-cutting success because every week of delay on the project increases the cost by $2 million.

The agreement does not exclude non-union contractors from bidding for MWRA work. However, they must abide by union pay scales and work rules, and their employees working on MWRA projects must join a trade union within seven days, MWRA officials said.

Flynn, in his critique of state plans, said the state's commitment of $1 million to artery-tunnel training programs "seems meager relative to the scope of the projects." The mayor proposed a mega-projects training

academy to be set up at the underused Humphrey Occupational Resource Center in Roxbury.

The state secretary of economic affairs, Grady B. Hedgespeth, last night called Flynn's ideas "very constructive suggestions." Hedgespeth said he is "very pleased with the tone the mayor is taking," after Flynn made several harshly worded criticisms of state proposals.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Title Omitted in Printing]

AFFIDAVIT OF DICK ANDERSON

Affiant, being first duly sworn, deposes and says as follows:

1. I have personal knowledge of the facts set forth herein and am competent to testify thereto.

2. I am president of Plumb House, Inc. ["the Company"].

3. The Company is a contractor incorporated in Massachusetts and is authorized to do business in the Commonwealth of Massachusetts. The Company is an ABC Mass member company which pays annual dues for ABC's services.

4. The Company is not presently a party to a collective bargaining agreement with any labor organization nor has any such organization been designated by a majority of the Company's employees as their representative.

5. The Company has successfully completed a number of projects similar to those called for under the Boston Harbor Clean-Up Project ("the Project"). The Company stands ready, willing, and able to bid and perform on a number of Project contracts, including those requiring a roofing, carpentry, or concrete contractor.

6. The Company has not bid on any Project contracts because the Boston Harbor Waste Water Treatment

Facilities Project Labor Agreement ("the Agreement") is incorporated by reference in all bid specifications issued by the Massachusetts Water Resources Authority via Specification 13.1.

7. Specification 13.1 requires that successful bidders must be willing to execute and comply with the Agreement after they are awarded a construction contract. Moreover, the Agreement provides that it will be incorporated into *all* future Project specifications. Under Specification 13.1, all the Company's employees would be governed by the wage and benefit provisions negotiated by the Council, the MWRA and Kaiser Engineers, Inc.

8. Specification 13.1 requires that successful bidders recognize particular unions as the sole and exclusive bargaining representative of all craft employees working on the Project, that all employees for Project work must be referred to contractors by local union hiring halls, that all employees covered by the Agreement are subject to the select union's compulsory membership provisions, and that aggrieved employees must seek redress through the unions named in the Agreement.

9. Specification 13.1 further requires that bidders and subcontractors agree to be bound by numerous terms and conditions of employment negotiated by the Council, including compulsory union dues and employee benefit plans different from those presently in effect at the Company's work sites.

10. The Company has not bid for any contracts advertised by the MWRA because of these and other similarly restrictive requirements incorporated in all bid specifications through Specification 13.1.

11. Among other reasons, the company does not wish to deal with any bargaining representative not designated by the Company's own employees. The Company also does not wish to have its employees compelled to join a union against their will, to hire its employees exclusively from a union hiring hall, to contribute to various

benefit funds required by the Agreement, nor to otherwise be bound to the numerous restrictive terms and conditions of employment spelled out in the Agreement.

12. The Company and its employees have in the past and are now willing and able to work in harmony with union and non-union contractors and their employees.

13. The Company provides employee benefits that differ from the employee benefit plans required under the Agreement.

14. Bid specification 13.1 places the Company at a competitive disadvantage by requiring the Company to deviate from its established employment practices, compels the Company to give up its right to deal only with a union designated by a majority of its employees, and compels the Company to adopt state-imposed employee benefit plans different from its own. Thus, the bid specification effectively prevents the company from bidding the Project.

15. The Company has suffered and will continue to suffer the loss of significant business opportunities represented by the contracts awarded and contracts to be awarded under the $6.1 billion Project, absent relief from the requirements of bid specification 13.1.

I affirm, under penalty of perjury, that the foregoing is true to the best of my knowledge, information and belief.

DICK ANDERSON
President
Plumb House, Inc.

Subscribed and sworn to before me, a Notary Public for the Commonwealth of Massachusetts, the —— day of ————, 1990.

Notary Public
My Commission Expires: ———

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Title Omitted in Printing]

AFFIDAVIT OF F. LESTER FRASER

Affiant, being first duly sworn, deposes and says as follows:

1. I have personal knowledge of the facts set forth herein and am competent to testify thereto.

2. I am president of Fraser Engineering Company, Inc. ["the Company"].

3. The Company is a contractor incorporated in Massachusetts and is authorized to do business in the Commonwealth of Massachusetts.

4. The Company is not presently a party to a collective bargaining agreement with any labor organization nor has any such organization been designated by a majority of the Company's employees as their representative.

5. The Company has successfully completed a number of projects similar to those called for under the Boston Harbor Clean-Up Project ("the Project"). The Company stands ready, willing, and able to bid and perform on a number of Project contracts, including those requiring a mechanical, HVAC, plumbing, electrical or sprinkler contractor.

6. The Company has not bid on any Project contracts because the Boston Harbor Waste Water Treatment Facilities Project Labor Agreement ("the Agreement") is incorporated by reference in all bid specifications issued by the Massachusetts Water Resources Authority via Specification 13.1.

7. Specification 13.1 requires that successful bidders must be willing to execute and comply with the Agreement after they are awarded a construction contract. Moreover, the Agreement provides that it will be incorporated into *all* future Project specifications. Under Specification 13.1, all the Company's employees would be governed by the wage and benefit provisions negotiated by the Council, the MWRA and Kaiser Engineers, Inc.

8. Specification 13.1 requires that successful bidders recognize particular unions as the sole and exclusive bargaining representative of all craft employees working on the Project, that all employees for Project work must be referred to contractors by local union hiring halls, that all employees covered by the Agreement are subject to the select union's compulsory membership provisions, and that aggrieved employees must seek redress through the unions named in the Agreement.

9. Specification 13.1 further requires that bidders and subcontractors agree to be bound by numerous terms and conditions of employment negotiated by the Council, including compulsory union dues and employee benefit plans different from those presently in effect at the Company's work sites.

10. The Company has not bid for any contracts advertised by the MWRA because of these and other similarly restrictive requirements incorporated in all bid specifications through Specification 13.1.

11. Among other reasons, the Company does not wish to deal with any bargaining representative not designated by the Company's own employees. The Company also does not wish to have its employees compelled to join a union against their will, to hire its employees exclusively from a union hiring hall, to contribute to various benefit funds required by the Agreement, nor to otherwise be bound to the numerous restrictive terms and conditions of employment spelled out in the Agreement.

12. The Company and its employees have in the past and are now willing and able to work in harmony with union and non-union contractors and their employees.

13. The Company provides employee benefits that differ from the employee benefit plans required under the Agreement.

14. Bid specification 13.1 places the Company at a competitive disadvantage by requiring the Company to deviate from its established employment practices, compels the Company to give up its right to deal only with a union designated by a majority of its employees, and compels the Company to adopt state-imposed employee benefit plans different from its own. Thus, the bid specification effectively prevents the company from bidding the Project.

15. The Company has suffered and will continue to suffer the loss of significant business opportunities represented by the contracts awarded and contracts to be awarded under the $6.1 billion Project, absent relief from the requirements of bid specification 13.1.

I affirm, under penalty of perjury, that the foregoing is true to the best of my knowledge, information and belief.

/s/ F. Lester Fraser
F. LESTER FRASER
President
Fraser Engineering Company, Inc.

Subscribed and sworn to before me, a Notary Public for the Commonwealth of Massachusetts, this 1st day of March, 1990.

/s/ Harry L. Fraser
Notary Public
My Commission Expires: 12-4-92

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Title Omitted in Printing]

AFFIDAVIT OF C. W. H. LOWTH, JR.

Affiant, being first duly sworn, deposes and says as follows:

1. I have personal knowledge of the facts set forth herein and am competent to testify thereto.

2. I am president of Charwill Construction, Inc. ["the Company"].

3. The Company is a contractor incorporated in New Hampshire and is authorized to do business in the Commonwealth of Massachusetts. The Company is an ABC Mass member company which pays annual dues for ABC's services.

4. The Company is not presently a party to a collective bargaining agreement with any labor organization nor has any such organization been designated by a majority of the Company's employees as their representative.

5. The Company has successfully completed a number of projects similar to those called for under the Boston Harbor Clean-Up Project ("the Project"). The Company stands ready, willing, and able to bid and perform on a number of Project contracts, including those requiring a contractor who specializes in water and sewage treatment plant construction and rehabilitation.

6. The Company has not bid on any Project contracts because the Boston Harbor Waste Water Treatment Facilities Project Labor Agreement ("the Agreement") is incorporated by reference in all bid specifications issued by the Massachusetts Water Resources Authority via Specification 13.1.

7. Specification 13.1 requires that successful bidders must be willing to execute and comply with the Agreement after they are awarded a construction contract. Moreover, the Agreement provides that it will be incorporated into *all* future Project specifications. Under Specification 13.1, all the Company's employees would be governed by the wage and benefit provisions negotiated by the Council, the MWRA and Kaiser Engineers, Inc.

8. Specification 13.1 requires that successful bidders recognize particular unions as the sole and exclusive bargaining representative of all craft employees working on the Project, that all employees for Project work must be referred to contractors by local union hiring halls, that all employees covered by the Agreement are subject to the select union's compulsory membership provisions, and that aggrieved employees must seek redress through the unions named in the Agreement.

9. Specification 13.1 further requires that bidders and subcontractors agree to be bound by numerous terms and conditions of employment negotiated by the Council, including compulsory union dues and employee benefit plans different from those presently in effect at the Company's work sites.

10. The Company has not bid for any contracts advertised by the MWRA because of these and other similarly restrictive requirements incorporated in all bid specifications through Specification 13.1.

11. Among other reasons, the Company does not wish to deal with any bargaining representative not designated by the Company's own employees. The Company also does not wish to have its employees compelled to join a union against their will, to hire its employees exclusively from a union hiring hall, to contribute to various benefit funds required by the Agreement, nor to otherwise be bound to the numerous restrictive terms and conditions of employment spelled out in the Agreement.

12. The Company and its employees have in the past and are now willing and able to work in harmony with union and non-union contractors and their employees.

13. The Compay provides employee benefits that differ from the employee benefit plans required under the Agreement.

14. Bid specification 13.1 places the Company at a competitive disadvantage by requiring the Company to deviate from its established employment practices, compels the Company to give up its right to deal only with a union designated by a majority of its employees, and compels the Company to adopt state-imposed employee benefit plans different from its own. Thus, the bid specification effectively prevents the company from bidding the Project.

15. The Company has suffered and will continue to suffer the loss of significant business opportunities represented by the contracts awarded and contracts to be awarded under the $6.1 billion Project, absent relief from the requirements of bid specification 13.1.

I affirm, under penalty of perjury, that the foregoing is true to the best of my knowledge, information and belief.

/s/ C. W. H. Lowth, Jr.
C. W. H. LOWTH, JR.
President
Charwill Construction, Inc.

Subscribed and sworn to before me, a Notary Public for the State of Texas, this 2nd day of March, 1990.

/s/ Faye Schaper
Notary Public
My Commisison Expires:
6-22-91

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Title Omitted in Printing]

AFFIDAVIT OF DANIEL J. BENNET

Affiant, being first duly sworn, deposes and says as follows:

1. I have personal knowledge of the facts set forth herein and am competent to testify thereto.

2. I am Executive Vice President of Associated Builders and Contractors, Inc. ("ABC National").

3. Founded in 1950, ABC is a national construction trade association representing over 18,000 member companies in 80 local chapters across the country with over 1 million employees who believe in the merit shop philosophy, *i.e.*, that construction jobs should be awarded to the lowest responsible bidder regardless of labor affiliation. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc. ("ABC Mass") is one of ABC's local chapters.

4. Although, most of ABC's member companies are not signators to collective bargaining agreements with any unions, they hire employees regardless of whether they are union members or independent craft people. ABC member companies subcontract work to other companies based on the lowest responsible bid, regardless of whether a subcontractor may be open shop or union-affiliated.

5. ABC's merit shop philosophy is founded upon a number of basic tenants [*sic*], including the view that all

construction contracts—public and private—should be awarded to the lowest responsible bidder, regardless of a labor affiliation, through open and competitive bidding. This practice provides taxpayers and consumers with the most value for their construction dollar. ABC espouses the view that every worker in a merit shop company should be paid and promoted based on his or her skills, initiative and desire for individual accomplishment and that union and non-union companies can, and should, work cooperatively on the same jobsite. ABC member companies and their employees are willing and able to work in harmony with union and non-union contractors and their employees and have done so on thousands of projects both public and private across the country.

6. Approximately seventy-five percent of all industrial construction and maintenance work in the United States is performed on a merit shop basis. Union membership as a percentage of the construction industry has steadily declined to the point today that union membership comprises only 21% of the construction work force across the United States.

7. In exchange for dues payments by local chapters, ABC offers its members and their employees a number of services. For example, ABC has established the only construction Safety Management Academy in the construction industry. Registration for the academy is open to all who can benefit from the educaton programming including open shop, closed shop and non-members. In addition, ABC offers a Project Managers Academy, a Supervisor's Academy and a comprehensive Apprenticeship Training Program.

8. ABC believes that government at the national, state and local levels has an obligation to operate with a sense of fiscal accountability, and that it is in the public interest to insure that government contracts are awarded to the lowest responsible bidder—a practice that assures the tax-

payer of getting the best possible product for his tax dollar.

9. ABC companies have successfully completed a number of projects similar to those called for under the Boston Harbor Clean-Up Project. These contractors stand ready, willing, and able to bid and perform on a number of Project contracts.

10. For projects like the Boston Harbor clean-up, ABC member contractors can save as much as 20% on labor costs as compared to union contractors, absent the restrictions imposed by the Agreement. These savings are a product of the fact that ABC contractor employees have greater flexibility with respect to their work rules and hours and with respect to their job classifications. These savings enable ABC contractors to successfully bid projects such as the Harbor clean-up Project even though the wage structure is established for all workers by the Commonwealth.

11. ABC member contractors have been deterred from bidding on any Harbor clean-up contracts because the Boston Harbor Waste Water Treatment Facilities Project Labor Agreement ("the Agreement") is incorporated by reference into all bid specifications issued by the Massachusetts Water Resources Authority via Specification 13.1.

12. Specification 13.1 requires that successful bidders must be willing to execute and comply with the Agreement after they are awarded a construction contract. Moreover, the Agreement provides that it will be incorporated into *all* future Project specifications. Under Specification 13.1, all ABC member employees would be governed by the wage and benefit provisions negotiated by the Council, the MWRA and Kaiser Engineers, Inc.

13. Specification 13.1 requires that successful bidders recognize particular unions as the sole and exclusive bargaining representative of all craft employees working on

the Project, that all employees for Project work must be referred to contractors by local union hiring halls, that all employees covered by the Agreement are subject to the select union's compulsory membership provisions, and that aggrieved employees must seek redress through the unions named in the Agreement.

14. Specification 13.1 further requires that bidders and subcontractors agree to be bound by numerous terms and conditions of employment negotiated by the Council, including compulsory union dues and employee benefit plans different from those presently in effect at ABC company work sites.

15. Among other reasons for ABC member companies' refusal to bid the Project absent an injunction with respect to Specification 13.1, is that ABC member companies do not wish to deal with any bargaining representative not designated by the company's own employees. Additionally, ABC companies do not wish to have their employees compelled to join a union against their will, to hire their employees exclusively from a union hiring hall, to contribute to various benefit funds required by the Agreement, or to otherwise be bound to the numerous restrictive terms and conditions of employment spelled out in the Agreement.

16. Specification 13.1 places ABC member companies at a competitive disadvantage by requiring them to deviate from their established employment practices. ABC provides numerous employee benefits that differ from the employee benefit plans required under the Agreement. For example, although ABC has its own apprenticeship program for member contractor employees, Specification 13.1 would require that these employees participate in the Council's apprenticeship program. ABC employees would thus receive different training than that provided by the ABC apprenticeship program and other ABC programs. Specification 13.1 also compels ABC companies to give up their right to deal only with a union designated by a

majority of their employees. Adherence to the Agreement would require that ABC companies contribute to different benefit and trust funds over which the ABC companies and their employees would have no control and from which they would derive no benefit. ABC would have to administer two sets of compensation schedules. The mandatory union hiring hall would deny ABC companies the right to choose the men and women that they would like to employ, while denying these employees the right to choose whether or *not* to join a union. The terms of the Agreement reached between the MWRA and Kaiser and the Council may suit the interests of the minority of the construction industry represented by the Council's unions, but such Agreement does not serve the interests of the public or of ABC member companies.

17. ABC companies have been injured and, absent relief from the requirements of Specification 13.1 will continue to be injured by this specification. Such injury includes the loss of significant business opportunities represented by the contracts awarded and contracts to be awarded under the $6.1 billion Project.

I affirm that I have read the foregoing and that it is true and accurate.

/s/ Daniel J. Bennet
DANIEL J. BENNET
Vice President
Associated Builders and
Contractors, Inc.

Subscribed and sworn to before me, a Notary Public for the District of Columbia, this 2nd day of March, 1990.

/s/ Rosita L. Howell
Notary Public

My Commission Expires:
July 1, 1990

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Title Omitted in Printing]

AFFIDAVIT OF GERALD W. KRIEGEL

Affiant, being first duly sworn, deposes and says as follows:

1. I have personal knowledge of the facts set forth herein and am competent to testify thereto.

2. I am president of Concrete Structures, Inc. ["the Company"].

3. The Company is a contractor incorporated in Massachusetts and is authorized to do business in the Commonwealth of Massachusetts. The Company is an ABC Mass member company which pays annual dues for ABC's services.

4. The Company is not presently a party to a collective bargaining agreement with any labor organization nor has any such organization been designated by a majority of the Company's employees as their representative.

5. The Company has successfully completed a number of projects similar to those called for under the Boston Harbor Clean-Up Project ("the Project"). The Company stands ready, willing, and able to bid and perform on a number of Project contracts, including those requiring a structural contractor with expertise in precast and prestressed concrete.

6. The Company has not bid on any Project contracts because the Boston Harbor Waste Water Treatment Facilities Project Labor Agreement ("the Agreement") is incorporated by reference in all bid specifications issued

by the Massachusetts Water Resources Authority via Specification 13.1.

7. Specification 13.1 requires that successful bidders must be willing to execute and comply with the Agreement after they are awarded a construction contract. Moreover, the Agreement provides that it will be incorporated into *all* future Project specifications. Under Specification 13.1, all the Company's employees would be governed by the wage and benefit provisions negotiated by the Council, the MWRA and Kaiser Engineers, Inc.

8. Specification 13.1 requires that successful bidders recognize particular unions as the sole and exclusive bargaining representative of all craft employees working on the Project, that all employees for Project work must be referred to contractors by local union hiring halls, that all employees covered by the Agreement are subject to the select union's compulsory membership provisions, and that aggrieved employees must seek redress through the unions named in the Agreement.

9. Specification 13.1 further requires that bidders and subcontractors agree to be bound by numerous terms and conditions of employment negotiated by the Council, including compulsory union dues and employee benefit plans different from those presently in effect at the Company's work sites.

10. The Company has not bid for any contracts advertised by the MWRA because of these and other similarly restrictive requirements incorporated in all bid specifications through Specification 13.1.

11. Among other reasons, the Company does not wish to deal with any bargaining representative not designated by the Company's own employees. The Company also does not wish to have its employees compelled to join a union against their will, to hire its employees exclusively from a union hiring hall, to contribute to various benefit funds required by the Agreement, nor to otherwise be bound to

the numerous restrictive terms and conditions of employment spelled out in the Agreement.

12. The Company and its employees have in the past and are now willing and able to work in harmony with union and non-union contractors and their employees.

13. The Company provides employee benefits that differ from the employee benefit plans required under the Agreement.

14. Bid specification 13.1 places the Company at a competitive disadvantage by requiring the Company to deviate from its established employment practices, compels the Company to give up its right to deal only with a union designated by a majority of its employees, and compels the Company to adopted state-imposed employee benefit plans different from its own. Thus, the bid specification effectively prevents the company from bidding the Project.

15. The Company has suffered and will continue to suffer the loss of significant business opportunities represented by the contracts awarded and contracts to be awarded under the $6.1 billion Project, absent relief from the requirements of bid specification 13.1.

I affirm, under penalty of perjury, that the foregoing is true to the best of my knowledge, information and belief.

/s/ Gerald W. Kriegel
GERALD W. KRIEGEL
President
Concrete Structures, Inc.

Subscribed and sworn to before me, a Notary Public for the Commonwealth of Massachusetts, this —— day of ————, 1990.

_____

Notary Public

My Commission Expires:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Title Omitted in Printing]

AFFIDAVIT OF NOEL (ROBERT J.) LEARY

Affiant, being first duly sworn, deposes and says as follows:

1. I have personal knowledge of the facts set forth herein and am competent to testify thereto.

2. I am Executive Vice President of Associated Builders and Contractors of Massachusetts/Rhode Island, Inc. ("ABC Mass").

3. ABC Mass is a local chapter of Associated Builders and Contractors, Inc. comprised of over 600 construction compaines in Massachusetts and Rhode Island (over 500 in Massachusetts alone) who believe in the merit shop philosophy, *i.e.*, that construction jobs should be awarded to the lowest responsible bidder regardless of labor affiliation.

4. Although ABC Mass' member companies are generally not signators to collective bargaining agreements with any unions, they hire employees regardless of whether they are union members or independent craft people. ABC Mass member companies subcontract work to other companies based on the lowest responsible bid, regardless of whether a subcontractor may be open shop or union-affiliated.

5. ABC National and ABC Mass (collectively "ABC") share the merit shop philosophy which is founded upon a number of basic tenets, including the view that all con-

struction contracts—public and private—should be awarded to the lowest responsible bidder, regardless of labor affiliation, through open and competitive bidding. This practice provides taxpayers and consumers with the most value for their construction dollar. ABC Mass, like ABC National, espouses the view that every worker in a merit shop company should be paid and promoted based on his or her skills, initiative and desire for individual accomplishment and that union and non-union companies can, and should, work cooperatively on the same jobsite.

6. Today over 60% of the construction projects in the MWRA service area are performed on a merit shop basis. ABC Mass member companies and their employees are willing and able to work in harmony with union and non-union contractors and their employees and have done so on hundreds of projects both public and private in Massachusetts and Rhode Island.

7. In exchange for dues payments by local chapters, ABC offers its members and their employees a number of services. For example, ABC has established the only construction Safety Management Academy in the construction industry. Registration for the academy is open to all who can benefit from the education programming including open shop, closed shop and non-members. In addition, ABC offers a Project Managers Academy, a Supervisor's Academy and a comprehensive Apprenticeship Training Program.

8. Both ABC Mass and ABC National believe that government at the national, state and local levels has an obligation to operate with a sense of fiscal accountability, and that it is in the public interest to insure that government contracts are awarded to the lowest responsible bidder—a practice that assures the taxpayer of getting the best possible product for his tax dollar.

9. ABC Mass companies have successfully completed a number of projects similar to those called for under

the Boston Harbor Clean-Up Project. These contractors stand ready, willing, and able to bid and perform on a number of Project contracts.

10. For projects like the Boston Harbor clean-up, ABC Mass member contractors can save as much as 20% on labor costs as compared to union contractors, absent the restrictions imposed by the Agreement. These savings are a product of the fact that ABC contractor employees have greater flexibility with respect to their work rules and hours and with respect to their job classifications. These savings enable ABC Mass contractors to successfully bid projects such as the Harbor clean-up Project even though the wage structure is established for all workers by the Commonwealth.

11. ABC Mass member contractors have been deterred from bidding on any Harbor clean-up contracts because the Boston Harbor Waste Water Treatment Facilities Project Labor Agreement ("the Agreement") is incorporated by reference into all bid specifications issued by the Massachusetts Water Resources Authority ("the MWRA") via specification 13.1 of the Instructions to Bidders ("Specification 13.1").

12. Specification 13.1 requires that successful bidders must be willing to execute and comply with the Agreement after they are awarded a construction contract. Moreover, the Agreement provides that it will be incorporated into *all* future Project specifications. Under Specification 13.1, all ABC Mass member employees would be governed by the wage and benefit provisions negotiated by the Council, the MWRA and Kaiser Engineers, Inc.

13. Specification 13.1 requires that successful bidders recognize particular unions as the sole and exclusive bargaining representative of all craft employees working on the Project, that all employees for Project work must be referred to contractors by local union hiring halls, that all employees covered by the Agreement are subject to

the select union's compulsory membership provisions, and that aggrieved employees must seek redress through the unions named in the Agreement.

14. Specification 13.1 further requires that bidders and subcontractors agree to be bound by numerous terms and conditions of employment negotiated by the Council, including compulsory union dues and employee benefit plans different from those presently in effect at ABC Mass company work sites.

15. Among other reasons for ABC Mass member companies' refusal to bid the Project absent an injunction with respect to Specification 13.1, is that ABC Mass member companies do not wish to deal with any bargaining representative not designated by the company's own employees. Additionally, ABC Mass companies do not wish to have their employees compelled to join a union against their will, to hire their employees exclusively from a union hiring hall, to contribute to various benefit funds required by the Agreement, or to otherwise be bound to the numerous restrictive terms and conditions of employment spelled out in the Agreement.

16. Specification 13.1 places ABC Mass member companies at a competitive disadvantage by requiring them to deviate from their established employment practices. ABC provides numerous employee benefits that differ from the employee benefit plans required under the Agreement. For example, although ABC has its own apprenticeship program for member contractor employees, Specification 13.1 would require that these employees participate in the Council's apprenticeship program. Employees of ABC Mass would thus receive different training than that provided by the ABC apprenticeship program and other ABC programs. Specification 13.1 also compels ABC companies to give up their right to deal only with a union designated by a majority of their employees. Adherence to the Agreement would require that ABC Mass companies contribute to different benefit

and trust funds over which the ABC Mass companies and their employees would have no control and from which they would derive no benefit. ABC companies would have to administer two sets of compensation schedules. The mandatory union hiring hall would deny ABC Mass companies the right to choose the men and women that they would like to employ, while denying these employees the right to choose whether or *not* to join a union. The terms of the Agreement reached between the MWRA and Kaiser and the Council may suit the interests of the minority of the construction industry represented by the Council's unions, but such Agreement does not serve the interests of the public or of ABC Mass member companies.

17. ABC Mass companies have been injured and, absent relief from the requirements of Specification 13.1 will continue to be injured by this specification. Such injury includes the loss of significant business opportunities represented by the contracts awarded and contracts to be awarded under the $6.1 billion Project.

I affirm under penalties of perjury that I have read the foregoing and that it is true and accurate.

/s/ Noel (Robert J.) Leary
NOEL (ROBERT J.) LEARY
Executive Director
Associated Builders and
Contractors of Massachusetts/
Rhode Island, Inc.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Title Omitted in Printing]

AFFIDAVIT OF GILBERT W. SIMMERS, JR.

Affiant, being first duly sworn, deposes and says as follows:

1. I have personal knowledge of the facts set forth herein and am competent to testify thereto.

2. I am Vice President of Chesterfield Associates, Inc. ("Chesterfield").

3. Chesterfield is a general contractor incorporated in New York and authorized to do business in the Commonwealth of Massachusetts. Chesterfield is a member of the Empire State Chapter of Associated Builders and Contractors, Inc. which pays annual dues for ABC National's services.

4. Chesterfield is not presently a party to a collective bargaining agreement with any labor organization nor has any such organization been designated by a majority of Chesterfield's employees as their representative.

5. Chesterfield has successfully completed a number of projects similar to those called for under the Boston Harbor Clean-Up Project ("the Project"). Chesterfield stands ready, willing, and able to bid and perform on a number of Project contracts requiring waterfront construction and site development, including those requiring steel sheathing work for wharves and dock construction.

6. Chesterfield has not bid on any Project contracts because the Boston Harbor Waste Water Treatment

Facilities Project Labor Agreement ("the Agreement) is incorporated by reference in all bid specifications issued by the Massachusetts Water Resources Authority via Specification 13.1.

7. Specification 13.1 requires that successful bidders must be willing to execute and comply with the Agreement after they are awarded a construction contract. Moreover, the Agreement provides that it will be incorporated into *all* future Project specifications. Under Specification 13.1, all Chesterfield's employees would be governed by the wage and benefit provisions negotiated by the Council, the MWRA and Kaiser Engineers, Inc.

8. Specification 13.1 requires that successful bidders recognize particular unions as the sole and exclusive bargaining representative of all craft employees working on the Project, that all employees for Project work must be referred to contractors by local union hiring halls, that all employees covered by the Agreement are subject to the select unions' compulsory membership provisions, and that aggrieved employees must seek redress through the unions named in the Agreement.

9. Specification 13.1 further requires that bidders and subcontractors agree to be bound by numerous terms and conditions of employment negotiated by the Council, including compulsory union dues and employee benefit plans different from those presently in effect at Chesterfield's work sites.

10. Chesterfield has not bid for any contracts advertised by the MWRA because of these and other similarly restrictive requirements incorporated in all bid specifications through Specification 13.1.

11. Among other reasons, Chesterfield does not wish to deal with any bargaining representative not designated by Chesterfield's own employees. Chesterfield also does not wish to have its employees compelled to join a

union against their will, to hire its employees exclusively from a union hiring hall, to contribute to various benefit funds required by the Agreement, nor to otherwise be bound to the numerous restrictive terms and conditions of employment spelled out in the Agreement.

12. Chesterfield and its employees are willing and able to work in harmony with union and non-union contractors and their employees. Chesterfield workers have worked alongside union workers on many occasions without difficulty.

13. Although Chesterfield provides training for its employees, Specification 13.1 would require that the company's employees participate in the Council's apprenticeship program.

14. Chesterfield provides numerous employee benefits that differ from the employee benefit plans required under the Agreement.

15. Bid Specification 13.1 places Chesterfield at a competitive disadvantage by requiring Chesterfield to deviate from its established employment practices, compels Chesterfield to give up its right to deal only with a union designated by a majority of its employees, and compels Chesterfield to adopt state-imposed employee benfit plans different from its own. Thus, the Specification 13.1 effectively prevents the company from bidding the Project.

16. Chesterfield has suffered and, absent relief from the requirements of bid Specification 13.1, will continue to suffer the loss of significant business opportunities represented by the marine construction and site development contracts awarded and to be awarded under the $6.1 billion Project.

I affirm, under penalty of perjury, that I have read the foregoing and that it is true and accurate.

Gilbert W. Simmers, Jr.
Vice President
Chesterfield Associates, Inc.

Subscribed and sworn to before me, a Notary Public for the Commonwealth of Massachusetts, this —— day of ————, 1990.

_____

Notary Public

My Commission Expires:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Title Omitted in Printing]

AFFIDAVIT OF RICHARD D. FOX

Richard D. Fox, first being duly sworn, deposes and says as follows:

1. I am the Director of the Program Management Division ("PMD") of the Massachusetts Water Resources Authority ("Authority" or "MWRA"). In that capacity, I am responsible for the overall direction and implementation of the Authority's activities pertaining to the Boston Harbor clean-up. In this capacity I have personal knowledge and information of those matters set forth in this affidavit except as otherwise noted.

2. I hold a degree in civil engineering and I am a registered Professional Engineer. I am also an attorney admitted to the Bar in Massachusetts and Wisconsin. I have extensive experience in the management of a large variety of construction related projects.

3. As Director of PMD, I was directly involved in the decision-making process which led MWRA to approve the negotiation of a Projcet Labor Agreement by its program manager/construction manager Kaiser Engineers, Inc. ("Kaiser") for the Boston Harbor Project, and to subsequently recommend Board approval of the results of that negotiation. The decision to approve Kaiser's suggestion of the negotiation of a Project Labor Agreement, which would maintain worksite harmony, labor-management peace, and stability during the course of MWRA's Boston Harbor Project, was made against the backdrop of numerous incidents and a variety of considerations.

4. The Authority was created to operate, regulate, finance, rehabilitate and modernize the Boston area's waterworks and sewage systems and to investigate, design and construct additions to the systems. Soon thereafter, the new Authority was named as a defendant in a federal court lawsuit by the U.S. Environmental Protection Agency, which alleged that sewage was being discharged into Boston Harbor, in violation of the Federal Clean Water Act. In September, 1985, the United States District Court for the District of Massachusetts ruled that the discharges did violate the Act's provisions and subsequently, on May 8, 1986, issued a comprehensive "Long-Term Scheduling Order" containing numerous milestones for the completion of the many different components of the Boston Harbor clean-up program. The construction of Deer Island wastewater treatment facility is being undertaken by the Authority in order to comply with this order. The order required the Authority to construct a large primary and secondary wastewater treatment plant and ancillary facilities on Deer Island by the year 1999. Failure to comply with this schedule will subject the Authority and its ratepayers to risk of substantantial fines and other remedies. A true and accurate copy of the current court-ordered schedule (now known as and hereinafter referred to as "Schedule Three") is attached as Exhibit "A". Schedule 3 did not take into consideration what I believed to be numerous factual circumstances inherent to the Project which significantly raise the potential for delay and added expense as the result of labor disputes. The principal factors not considered was the delays which could result from labor unrest. Yet the potential for unrest is real, as well as a number of other labor related factors, which could result in delay, and therefore the P/CM (Kaiser) was requested to develop an assessment of and plan to resolve these labor factors to avoid delay.

5. The simple fact that the Project will require the utilization of dozens of different contractors, many dif-

ferent Building Trade skills, and the fact that a substantial portion of the construction industry in the Eastern Massachusetts area for large scale projects is organized, will result in hundreds of labor negotiations over the ten year life of the Project. Each could delay the Project if they result in a work stoppage. It is the nature of the construction industry that each skilled trade negotiates a local area agreement with a group of contractors, and the MWRA as the owner, would ordinarily have no impact on those negotiations. Thus, if the local contractors and/or the union determine that a strike or lock-out was appropriate to enforce its negotiating position, the result could be a withdrawal of construction services on the Harbor Project. Additionally, I understand that unions have a legal right to picket for informational and/or area standards purposes, and union members have a legal and protective right not to cross those picket lines to go to work or to make deliveries. Again, considering the geographic structure of the Project, as described below, this valid and legal activity raised concerns in my mind concerning the ability to meet the court mandated schedule.

6. From 1987 through 1989, the performance of critical construction contracts at MWRA's wastewater collection and treatment facilities was on numerous occasions disrupted by labor unrest. These disruptions quickly demonstrated the importance of maintaining labor harmony within the workforces of the many MWRA contractors working on those construction projects. These disruptions caused particular concern when they arose at Deer Island, which is a 215.7 acre site at the end of a peninsula adjoining the Town of Winthrop. Deer Island is connected to the mainland only by a single narrow roadway, so that any picketing conducted at its main gate could and in fact did cause work stoppages to occur throughout Deer Island. Such stoppages jeopardized MWRA's ability to comply with the dealines set forth in Schedule 3. Additionally,

such stoppages gave rise to delays in MWRA's construction activities which could have frustrated its interim efforts to ameliorate or abate certain wastewater discharges into Boston Harbor, thereby prolonging environmental harm to important natural resources in Boston's Inner Harbor and Dorchester Bay.

7. An example of such a stoppage occurred during the performance by the Barletta Co., Inc. ("Barletta") of a $6,000,000 construction contract at Deer Island. This contract, which was critical to MWRA's Boston Harbor clean-up efforts, was a public works construction project within the meaning of M.G.L. c.149 and was subject to its filed sub-bidder provision. Merrimack Valley Mechanical Contractors ("MVMC") had been designated the low-qualified statutory sub-bidder for this contract and therefore became a sub-contractor to Barletta. MVMC did not have a collective bargaining relationship with Pipefitters Local 537 ("Local 537") or the Sheet Metal Workers Local 17 (Local 17). On November 9, 1988, Local 537 and Local 17 engaged in picketing at the main gate to Deer Island, objecting to the use of the non-union sub-contractor and demanding the use of union labor on all aspects of the contract. Because all unionized workers observed the picket line, construction work at Deer Island came to a virtual standstill.

8. MWRA encountered similar challenges at Deer Island and at other facilities:

(a) Informational picketing was threatened by Local 22 in August 1988, at MWRA's scum management project job site on Deer Island, based on the union's assertion that certain work being performed by non-union technical personnel rightfully belonged to its membership.

(b) Informational picketing at MWRA's Chelsea Creek Headworks occurred in late 1988, with Roofers Local 33 protesting that, due to the pres-

ence of non-union construction workers on the jobsite, "community standards" were not being observed during the rehabilitation of that facility.

(c) Carpenters and Piledrivers Local 56 conducted informational picketing at a non-union separate gate established at the entrance to Nut Island in April and May, 1989, alleging that union work on an on-shore pier piledriving project was being performed by non-union workers where MWRA's Nut Island Sewerage Treatment Plant is located. Local 56 complained that the separate gate system was not being strictly observed and at one point threatened to extend its picketing to the union gate; such an extension did not occur. The complaints of Local 56 did, however reflect the limited effectiveness of separate gate systems. Non-union workers did on occasion pass through, as did the Contractor's equipment thereby tainting, the union gate. Because of space constraints existing at the entrance to Nut Island, it was impossible to arrange separate gates large enough to accommodate union and non-union trucks and other pieces of large construction equipment.

(d) Informational picketing was conducted by IBEW Local 103 at the entrance gateway to Deer Island in March, 1989, based on its allegations that a non-union electrician, Aerial Electric, under contract with the City of Boston to provide services as needed at the Deer Island House of Correction, engaged in unfair labor practices. This picketing occurred for two days even though Aerial was not then engaged in any activities on Deer Island. Although MWRA had no relationship with Aerial, its construction activities on Deer Island were adversely impacted by the

picketing, inasmuch as many of MWRA's construction contractors' union employees honored the picket line.

9. These incidents as well as the inherent factors recited in ¶ 5 gave rise to grave concerns among MWRA staff that labor relations disputes would significantly hamper MWRA's performance of its mission to conduct the Boston Harbor Project. These concerns were communicated to and shared by MWRA's Board of Directors. These concerns grew deeper as MWRA moved to implement a provision of its mitigation agreement with the Town of Winthrop designed to minimize the impact of MWRA construction activities at Deer Island by limiting the volume of vehicle traffic passing through the community to Deer Island. Under that provision, MWRA agreed that it would:

(a) transport all bulk materials, including earth, gravel and reinforcing steel, to and from the site by barge;

(b) use all roll-on/roll-off transport for heavy trucking; and

(c) transport workers to the construction site bus and ferry, with at least 50% of the workers being transported by ferry.

MWRA has selected four locations around the harbor for facilities to transport construction workers to Deer Island; Squantum Point in Quincy; Rowes Wharf in Boston; Beverly Street, behind Boston's North Station; and a site on the Mystic River in the Charlestown/Everett area. Construction materials and equipment are to be shipped to Deer Island from MWRA's Fore River Staging Area in Quincy; this site, formerly the General Dynamics Shipyard, was acquired by MWRA in August, 1987. Additionally, workers are transported by bus to Deer Island from a portion of the Suffolk Downs property in Revere which is under lease to MWRA. The an-

ticipated use of these facilities and modes of transportation raised additional construction labor relations issues which, if not resolved, posed further threats to the maintenance of labor harmony. For example, it was unclear where job site entrances, for purposes of erecting separate gates, would be: would they be at the entrance to each MWRA transportation facility, at the entryway to each ferry or bus, or at the actual entrance to the site of construction? Given the close proximity of workers on ferries and buses, would two sets of buses and ferries, one union and the other non-union, be necessary? Furthermore, WMRA staff was concerned that maritime union workers needed for the transportation of construction workers to the Deer Island construction site might object to the involvement of non-union tradesmen in the project.

10. During the Fall of 1988, and the Winter of 1988-89, Kaiser recommended to me and my staff that a Project Labor Agreement could provide the framework to solve the concerns which I had regarding potential delays. Although it was noted to me that a Project Labor Agreement had never been negotiated in Suffolk County, Kaiser believed that there was a reasonable probability that a Project Agreement could be negotiated. Based on Kaiser's recommendation, we authorized the development of a program leading to negotiations. We advised Kaiser that we could not be committed to any Agreement until we saw its results, particularly because of our concern that any Agreement be an across-the-board document providing disputes resolution procedures for all possible disputes, resolving issues relating to differences in travel pay, and a number of other concerns which we felt needed to be resolved so that we could be assured of labor harmony and stability on the Project.

11. Accordingly, Kaiser entered negotiations on a Project Labor Agreement for the Boston Harbor Project in 1989. These negotiations were conducted with: repre-

sentatives of the Building and Construction Trades Council of the Metropolitan District and its affiliated local unions; Local 52, Bricklayers; Local 424, Carpenters; Local 133, Laborers; and the Building and Construction Trades Department, AFL-CIO and its affiliated international unions and their affiliated local unions (collectively, "the unions"). As the result of these negotiations, Kaiser and the unions entered into the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement ("the Agreement") on May 22, 1989.

12. The most significant provisions of the Agreement with regard to its ability to achieve labor harmony are:

(a) standardization of certain working conditions for all construction employees, notably, working hours and travel pay;

(b) a 10-year no-strike guarantee by the unions; and

(c) the establishment of procedures to resolve quickly and efficiently any type of dispute that may arise on the Boston Harbor Project.

13. I believe that it would be impossible to maintain jobsite labor harmony in the performance of the Boston Harbor Project without the Agreement and that any action which either temporarily or permanently suspended or overturned the terms of the Agreement would cause the Authority irreparable harm. This belief is based on the record of construction trades labor disruption as described above which existed prior to the negotiation of the Agreement. The resumption of work stoppages would jeopardize MWRA's ability to comply with the deadlines set forth in Schedule 3 and could subject the Authority and its ratepayers to risk of substantial fines. Additionally, such stoppages would give rise to delays in MWRA's construction activities, thereby frustrating its efforts to ameliorate or abate wastewater discharges into Boston

Harbor, thereby prolonging environmental harm to important natural resources in Boston's Inner Harbor and Dorchester Bay. Furthermore, such stoppages and their resultant construction delays could give rise to substantial cost overruns which would have to be borne by the Authority and its ratepayers.

14. Suspending or overturning the terms of the Agreement would further cause the Authority and its ratepayers irreparable harm by diminishing the willingness of the investment community to finance MWRA's capital programs. The Official Statement for the Authority's recent $800,000,000 general revenue bond offering recited a brief history and summary of the Agreement and noted that "[t]he Authority believes that the [A]greement is a prerequisite to the timely completion of the Project." In February, 1990, I participated in an MWRA presentation in Baltimore, Maryland to a group of potential bond purchasers. The general reluctance of this group to participate in our Project's financing, due to labor unrest then existing on the Baltimore waterfront, was dispelled only when I discussed with the group the terms and effects of the Agreement. I am informed that, relying on this representation, the investor group did purchase MWRA bonds.

/s/ Richard D. Fox
RICHARD D. FOX

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. March 22, 1990

Then personally appeared before me the said Richard D. Fox and made oath that the foregoing statements are true.

/s/ Catherine L. Farrell
Notary Public

My commission expires: Feb. 4, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Title Omitted in Printing]

AFFIDAVIT OF KENNETH M. WILLIS

Kenneth M. Willis, first being duly sworn, deposes and says as follows:

1. I am employed at Kaiser Engineers, Inc. ("Kaiser") as Project Manager to manage, direct, advise, supervise, and consult with the Massachusetts Water Resources Authority ("Authority" or "MWRA") with regard to the Authority's "Boston Harbor Project". I have been in this position since Kaiser was retained by the Authority in April, 1988.

2. Kaiser was retained (after an open bidding process) to advise the Authority and help it prepare for the undertaking of the Boston Harbor Project and among other things to advise the Authority on the development of a labor relations policy for the Project; to investigate and advise the Authority concerning the supply of skilled labor; to advise the Authority on the best methods to avoid labor disruption and delays caused by labor disputes or disruption; and to oversee the labor relations policy as it might be adopted by the Authority. To the best of my belief and understanding, one of the reasons why Kaiser was selected was our experience in overseeing labor relations matters on large construction projects. For example, I had been the Project Manager for the billion dollar Coal Gasification facility construction in North Dakota in the early 1980's, a project which was done under a Project Labor Agreement negotiated with

the Building Trades Department, AFL-CIO and all of the Building Trades Unions.

3. Kaiser Engineers, Inc., including its wholly owned subsidiary company, constitutes a national organization engaged exclusively in the construction industry, including designing, consulting, engineering, and direct hire construction of projects including nuclear power plants; coal gasification facilities; nuclear facilities at the Hanford Federal Reservation; and construction of public transit facilities in Boston, Miami, and Los Angeles. Kaiser has had collective bargaining agreements with hundreds of building trades unions over the last 25 years.

4. Based on Kaiser's labor relations experience, we advised the Authority at an early date that we believed it might be in the best interests of the Authority if Kaiser were permitted to negotiate a Project Labor Agreement to cover the Project. Our recommendations were based on a number of factors including:

A. The rigid time targets established by the United States District Court;

B. The geographical constraints on the Project;

C. The transportation constraints on the Project;

D. The length of time the Project was to be underway;

E. The cost of delays on the Project, based on inflation, the time value of money, and overhead expenses;

F. The fact that, in the Eastern Massachusetts area and in the Suffolk County area in particular, any Project of this size would have a significant union contractor component (in Suffolk County more than 75% of the commercial construction work is done by union contractors), and there-

fore the Project would be vulnerable to labor disputes which could arise from

(i) the renegotiation of local labor agreements with contractor associations every two to three years, with the potential for hundreds of lawful contractual labor disputes resulting in repeated interruption of work and consequent delays in the Project;

(ii) the need to harmonize conditions, such as work hours, travel pay, etc.; and

(iii) the potential for jurisdictional disputes among the various trades, or between the trades and unorganized contractors.

G. If there are one or more unionized contractors working on this multi-craft Project, there is the potential for disputes among craft unions over assignment of work. The jurisdictional dispute mechanisms of the National Labor Relations Board and the AFL-CIO are time consuming and administratively cumbersome.

H. If non-union contractors are working on the site, there is also the potential that their employees would seek to be organized, or the Building Trades Unions would seek to organize them, and in each instance, there is the potential for valid, legal picketing and/or work stoppages which would delay the Project;

I. The fact that without a total no-strike commitment under which the labor organizations waive their right to respect picketing activity, the potential exists for a single picket at the Fore River Staging Area or the entrance to Deer Island to significantly disrupt and delay the Project; and

J. Even with varying degrees of no-strike protection in local labor agreements, a project can still be interrupted unless the contractor has established an expedited arbitration procedure and all parties who may be involved in the dispute are bound to the same procedure.

K. From my experience, an all encompassing labor agreement, which includes expedited disputes resolution procedures for every possible type of labor disruption is the only effective safeguard for the efficient, economical and timely completion of major multi-craft projects.

5. On behalf of Kaiser, I recommended that the Authority consider the desirability of a Project Labor Agreement. We also indicated, however, that the practical and legal parameters of such an Agreement should be fully explored before the Authority considered formal adoption of such an Agreement as its labor relations policy. The staff of the Authority informed me that we were authorized to go forward to explore the possibility and practicality of such an Agreement but that the Authority would withhold any approval of a Project Agreement until negotiations had been completed and the Authority staff had had the opportunity to review the results.

6. In early May, 1989, the Kaiser negotiating team commenced bargaining with the Building and Construction Trades Unions, including the Building and Construction Trades Department, AFL-CIO, its affiliated international unions and their affiliated local unions with the objective of achieving a Project Labor Agreement.

7. I was a member of the negotiating team on behalf of Kaiser, along with C. R. Fitzgerald, W. J. Curtin and E. C. Uehlein, Jr. We informed the Unions, who were led by Mr. John Simmons, President of the Metropolitan Building Trades Council, and Mr. Joseph Nigro, Secretary-Treasurer, that we would hope to negotiate an Agree-

ment which all parties would agree was appropriate for the Harbor Project, but that until final agreement was reached and the document was reviewed by the Authority, there could be no guarantees that the Authority would utilize the Agreement as the labor relations program for the Harbor Project.

8. Negotiations were concluded and an Agreement executed between Kaiser and the Building Trades on May 22, 1989. Subsequently, we recommended to the staff of the Authority that it should be adopted for application on the Boston Harbor Project. In my opinion the Agreement, containing a no-strike pledge from all of the construction unions, the harmonization of many of the working conditions, and the across-the-board procedures for disputes resolution will lead to the most cost effective completion of the Project.

9. It is my understanding that the staff of the Project Management Division accepted Kaiser's recommendation and in turn, recommended that the MWRA Board adopt the Agreement as the labor policy for the Project, and authorize the staff to insert a requirement in the bid specifications for all new construction work requiring that the bidders be willing to abide by the Project Labor Agreement. The Board adopted the staff's recommendation on May 28, 1989.

10. As I have outlined above, Kaiser's role under contract to the Authority is primarily to advise and assist the Authority in getting the Harbor Project underway, and to manage and supervise the ongoing construction activity on the Project. Nevertheless, it is also recognized and expected, and has been since Kaiser commenced this work, that Kaiser would employ direct hire construction labor. Thus, we advised the unions during the negotiations for the Project Labor Agreement that Kaiser would hire craft labor under the Project Labor Agreement and its Schedule A's under one or more of the following circumstances:

A. The default of a contractor;

B. Unsatisfactory or incomplete performance of a subcontractor;

C. Projects requiring limited new construction work, where the time and effort necessary to bid the work is inappropriate, such as construction of temporary facilities for work on the Island, and maintenance and modification of those facilities; and/or

D. Clean-up work at the end of the Project. It would not be unusual for Kaiser to perform direct hire work under the circumstances noted above, and Kaiser has in fact performed such work in the past on construction projects for which it was the General Contractor or the Construction Manager for both public and private owners.

11. The Project Agreement as negotiated permits Kaiser to act as an execution contractor or otherwise perform the direct hire work noted above. Additionally, our agreement with the MWRA permits direct hire construction work on the type of work outlined above.

12. As a result of Kaiser's work in the Eastern Massachusetts area, where Kaiser has maintained an office for 25 years, Kaiser is familiar with the labor relations situation and the local construction unions. It is that experience, as well as our experience throughout the country, which led us to recommend the consideration of a Project Labor Agreement to the Authority. Prior to our recommendation to the Authority, we had had no discussion with organized labor, nor were we informed of or aware of any threats or statements made by organized labor which may have been calculated to induce the Authority or Kaiser to recommend a Project Labor Agreement. The labor disputes with which I am familiar and which occurred on the entrances to Deer and Nut Island are typical, predictable labor disputes involving protests

about the use of non-union contractors and/or working conditions.

/s/ Kenneth M. Willis
KENNETH M. WILLIS

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. March 22, 1990

Then personally appeared before me the said Kenneth M. Willis and made oath that the foregoing statements are true.

/s/ Catherine L. Farrell
Notary Public
My commission expires Feb. 4, 1994

[JANUARY 12, 1990 MEMORANDUM]

TO: JAMES F. SNOW, COMMISSIONER

FROM: PETER WALTONEN, DEPUTY GENERAL COUNSEL—CIVIL DIVISION

RE: FRASER ELECTRIC/M.W.R.A.

DATE: JANUARY 12, 1990

Any analysis of the legality of the "BOSTON HARBOR WASTEWATER TREATMENT FACILITIES PROJECT LABOR AGREEMENT" (Labor Agreement) by the MWRA for use in the bidding of public works construction projects necessarily must begin with an analysis of the Labor Agreement and then proceed to analysis of the relevant federal and state law.

ANALYSIS OF THE LABOR AGREEMENT

The Labor Agreement is an agreement between the MWRA (through Kaiser Engineers) and various local unions signatory to the document. The title itself, "KAISER ENGINEERS, INC. ON BEHALF OF THE MASSACHUSETTS WATER RESOURCES AUTHORITY," declares on its face the relationship between Kaiser Engineering and the MWRA: that of Agent (Kaiser) and Principal (MWRA). Kaiser executed the document as "Project Contractor" on behalf of the MWRA, as its agent.[1]

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[1] See p. 1 of the Labor Agreement "This Project Labor Agreement . . . is entered into this 22nd day of May 1989, by and between Kaiser Engineers, Inc. (hereinafter, the "Project Contractor"), its successors or assigns, . . . with respect to the construction of the wastewater treatment facilities and related facilities in Suffolk and Norfolk Counties, Massachusetts, known as the "Boston Harbor Project." Two employees of Kaiser Engineers signed for the "Proj-

The terms of the Labor Agreement apply to all construction work in connection with wastewater treatment facilities being developed in and around Boston Harbor by the MWRA. It is limited to construction work under the direction of Kaiser Engineers and all contractors of "whatever tier which have contracts awarded for such work on and after the effective date of this Agreement. . ." [2]

The Labor Agreement sets forth the conditions for bidding and award of contract as follows:

> The awarding authority has the "Absolute right to select any qualified bidder for the award of contracts on this Project without reference to the existence or nonexistence of any Agreements between such bidder and any party to this Agreement *provided*, however, *only that such bidder is willing, ready and able to execute and comply with the* [*Labor Agreement*], *should it be designated the successful bidder.*" [3] [emphasis added].

Thus, while the Labor Agreement purports to allow the MWRA to select any qualified bidder, the above-referenced proviso clause limits the term "qualified bidder" to include only those bidders who "execute and comply" with the Labor Agreement, thereby restricting the scope of bidders eligible for award.

The Labor Agreement further requires that "all direct subcontractors" of a successful contractor (one who has been awarded a contract) must "accept and be bound by

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ect Contractor." However, it is important to remember that Kaiser Engineers acted "ON BEHALF OF THE MASSACHUSETTS WATER RESOURCES AUTHORITY" and thus, the Agreement stands upon MWRA's ability to so contract.

[2] Article II, Section 1, p. 4.

[3] Article II, Section 2(a), p. 5.

the [Labor Agreement]."[4] The Labor Agreement provides that said agreement takes precedence over any local, area or national agreements[5] and that the agreement is self-contained and stands alone. Thus contractors are not required to sign any other collective bargaining agreement.[6] The Labor Agreement contains provisions for the resolution of disputes;[7] recognizes the Union as the sole and exclusive bargaining representative of all craft employees working within the scope of the agreement;[8] requires that all applicants for jobs within the various classifications covered by the Labor Agreement be referred by the Union through its hiring hall.[9]

The Labor Agreement further requires that all Apprentices be hired through the Union hiring hall.[10] The Union agrees not to strike during the term of the collective bargaining agreement and in turn, the management agrees not to conduct a lock-out.[11] Either party in any dispute may call for a permanent arbitrator to resolve the dispute.[12]

The justification for such a collective bargaining agreement and its requirement that each successful bidder sign the collective bargaining agreement is stated in the Labor Agreement as follows:

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[4] Article II, Section 2(b), p. 5.

[5] Article II, Section 3(a), p. 5.

[6] Article II, Section 3(b), p. 6.

[7] Article II, Sections 3(b) and 9, pp. 6 and 8.

[8] Article III, Section 1, p. 10.

[9] Article III, Section 2, p. 10.

[10] Article XI, Sections 1 and 2, p. 32 and 33.

[11] Article VI, Section 1, p. 17.

[12] Article VI, Section 4, p. 18.

ARTICLE I

PURPOSE

The Boston Harbor Project, an undertaking of the Massachusetts Water Resources Authority, is the largest public works project in the history of New England. The goal of the Project is to provide effective sewage disposal for the people of Massachusetts. Pursuant to an order issued by the United States District Court for the District of Massachusetts, the Authority has authorized the construction of new wastewater treatment facilities and related facilities to reduce pollution in the Boston Harbor. The Court has ordered that these facilities be completed within specified and limited time frames.

The timely and successful completion of the Project is of vital importance to all the people of the Commonwealth of Massachusetts. Therefore, it is essential that the construction work be done in an efficient and economical manner in order to secure optimum productivity and to eliminate any delays in the work. In recognition of the special needs of this Project and to maintain a spirit of harmony, labor-management peace, and stability during the term of this Project Labor Agreement, the parties agree to establish effective and binding methods for the settlement of all misunderstandings, disputes or grievances which may arise. Therefore, the Unions agree not to engage in any strike, slowdown or interruption of work and the Contractor agrees not to engage in any lockout.

It is uncontroverted that the exclusive use of contractors signatory to Labor Agreements is an active policy implemented by the MWRA in its public works construction projects.

THE LABOR AGREEMENT IS A COLLECTIVE BARGAINING AGREEMENT AND THUS SUBJECT TO THE STANDARDS OF 29 U.S.C.A., S.158, THE NATIONAL LABOR RELATIONS ACT (N.L.R.A.)

There can be no doubt that the instant Labor Agreement is a collective bargaining agreement which the successful bidder on an MWRA project must sign in order to obtain the contract.

Normally, such a requirement would violate the N.L.R.A.; however, in 29 U.S.C.A., s.158(F), the Congress enacted an exception for the building and construction industry. This exception allows an employer who is primarily engaged in the construction industry to enter into a pre-hire agreement and require all contractors and subcontractors to observe the terms of that agreement. This exception to the general requirements of the N.L.R.A. as set forth in s.158(a)(2) and (b) is unique to construction and came about as a result of the uniquely temporary, transitory and sometimes seasonal nature of the construction industry.[13]

29 U.S.C.A., s.158(F) provides in relevant part:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor

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[13] Kaiser and MWRA admit on p. 9 of their brief that if s.8(F) does not apply, then the instant agreement is a violation of s.8(a)(2) of the N.L.R.A.

> organization has not been established under the provisions of section 9 of this title prior to the making of such agreement . . .

By authorizing so-called "pre-hire" agreements like that at issue in this case, s.8(f) of the National Labor Relations Act, 29 USC s.158(f) [29 USCS s.158(f)], exempts construction industry employers and unions from the general rule precluding a union and an employer from signing "a collective-bargaining agreement recognizing the union as the exclusive bargaining representative when in fact only a minority of the employees have authorized the union to represent their interests." *NLRB v. Iron Workers*, 434 US 335, 344-345, 54 L.Ed2d 586, 98 S.Ct. 651(1978) (*Higdon*). See *Garment Workers v. NLRB*, 366 US 731, 737-738, 6 L.Ed.2d 762, 81 S.Ct.1603(1961). Section 8(f) provides in pertinent part:

> "It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members . . . because (1) the majority status of such labor organization has not been established under the provisions of section of this Act prior to the making of such agreement . . .: Provided . . . That any agreement [461 US 266] which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)." 73 Stat 545.

Thus, s.8(f) allows construction industry employers and unions to enter into agreements setting the terms and conditions of employment for the workers hired by the signatory employer without the union's majority status first having been established in the manner pro-

vided for under s.9 of the Act. One factor prompting Congress to enact s.8(f) was the uniquely temporary, transitory and sometimes seasonal nature of much of the employment in the construction industry. Congress recognized that construction industry unions often would not be able to establish majority support with respect to many bargaining units. See S Rep No. 187, 86th Cong, 1st Sess, 55-56 (1959) 1 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, pp 451-452 (Leg Hist). Congress also was cognizant of the construction industry employer's need to "know his labor costs before making the estimate upon which his bid will be based" and that "the employer must be able to have available a supply of skilled craftsmen for quick referral." HR Rep.No. 741, 86th Cong, 1st Sess, 19 (1959), 1 Leg Hist 777. See generally, *Higdon*, *supra*, at 348-349, 54 L.Ed.2d 586, 98 S Ct 651.

A review of the instant Labor Agreement, as it is currently constituted, reveals that such agreement does not and cannot fall within the construction industry exception contained in s.8(f) of the N.L.R.A.

The Labor Agreement meets the first two of the three preconditions for an exception: *i.e.*, the Labor Agreement covers employees in the building and construction industry and is with labor organizations of which building and construction employees are members. However, the employer of those contractors (the MWRA) is not an employer engaged primarily in the building and construction industry; thus the third condition is unmet and the exception in 29 U.S.C.A. s.158(f) allowing pre-hire agreements is inapplicable to the instant Labor Agreement.

It is the MWRA and *not* Kaiser who signs the construction contracts with bidders; bids the projects; owns the property or project built; pays the contractor; has contractual privity with the contractor. Indeed under both M.G.L. c.30, s.39M, and c.149, s.44A-44J, it is the

MWRA who is required by law to bid the project and execute a contract with the successful lowest responsible and eligible bidder. Moreover, public funds are expended on the construction project, not private funds of Kaiser Engineers, Inc. Thus, it is the MWRA who is clearly the employer in this situation.

In signing the Labor Agreement as "Project Manager," Kaiser Engineers, Inc., is acting in the capacity of agent for the MWRA. Kaiser Engineers, Inc., thus stands in the shoes of the MWRA and is precluded from entering into a pre-hire agreement in behalf of the MWRA, where the MWRA itself has no authority to enter into such an agreement.

Moreover, not only does Kaiser Engineers lack contractual privity with any of the contractors who will actually perform work on the project, but Kaiser Engineers is merely the project manager and *not* the primary or general contractor for any project with MWRA in connection with the Boston Harbor Project. Both M.G.L. c.30, s.39M and c.149, ss.44A-44J require that a public bidding process be followed for the selection of the general contractor on any public works construction project. The general contractor must submit a bid to the awarding authority (here the MWRA), thereby creating contractual privity between the contractor and the awarding authority upon execution of a contract.

Thus the fact that Kaiser Engineers is an employer in the building and construction industry is legally irrelevant to the instant matter; the relevant question is whether or not the employer in this matter (the MWRA), is an employer primarily engaged in the building and construction industry. A review of the MWRA enabling legislation contained in M.G.L. c.92 App. Sections 1-1 *et seq.* reveals that the MWRA is not an employer primarily engaged in the building and construction industry.

The question of whether or not a public agency (such as the MWRA) can be an employer under the N.L.R.A. has been answered in the negative. See *Baltimore Building and Construction Trades Council*, 4 AMR par.10,177 (May 10, 1977) *aff'd*, 610 F.2d 1221 (4th Cir. 1979), in which the General Counsel for the N.L.R.B. refused to certify a question involving pre-hire agreements with a municipality *because the municipality was not an employer within the construction industry.* Similarly, the MWRA is not an employer within the construction industry, and thus the exception contained in s.8(f) is inapplicable.

A Massachusetts case in federal district court also held that a political subdivision of the Commonwealth cannot be an employer under the N.L.R.A. See *Local Division 589, Amalgamated Transit Union, AFL-CIO v. Amalgamated Transit Union, AFL-CIO*, 295 F. Supp. 630 (D.C. Mass. 1969) (Inasmuch as applicable state statute expressly labeled transportation authority as political subdivision of the Commonwealth, authority was not an employer under the National Labor Relations Act.) See also *Mass. Council of Const. Emp., Inc. v. Mayor of Boston*, 425 N.E. 2d 346, 384 Mass. 466, certiorari granted; *White v Massachusetts Council of Const. Emp., Inc.* 102 S.Ct. 1273, 455 U.S. 919, 71 L.Ed 2d 458, reversed 103 S.Ct. 1042, 460 U.S. 204, 75 L.Ed. 2d 1. (1981)

Neither the Commonwealth nor any subdivision may act in a manner that frustrates federal labor policy. There is no question that the MWRA is a political subdivision of the Commonwealth for purposes of M.G.L. c.30, s.39M and c.149, ss.44A-44J. See M.G.L. c.92 App., s.1-8(g):

> "The Authority shall be deemed to be a public agency for purposes of and shall be subject to, section forty-four A to forty-four H, inclusive of chapter one hundred and forty-nine of the General Laws, sections

thirty-nine M of chapter thirty of the General Laws . . ."

Accordingly, the exception contained in s.8(f) of the N.L.R.A. is not available to the MWRA and it may not enter into a pre-hire agreement with any union representatives. Therefore the instant Labor Agreement is a violation of the N.L.R.A. provisions and thus, a violation of M.G.L. c.149, s.20(c).

There is a distinct line of case authority which holds that municipal corporations and other public bodies and authorities, in contracting for public works, may not discriminate in favor of union labor by requiring that bidders for such contracts be restricted to employers of union labor where there are responsible contractors who employ other than union labor, or by refusing to award contracts to otherwise qualified and responsible bidders upon the ground that they do not employ union labor, where they are willing to undertake the work at the same or a lower figure.[14]

Under this rule a stipulation in a public contract entered into with the lowest bidder, providing that none but union labor should be employed, has been held void.[15] Some courts have held that a valid contract cannot be let

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[14] *Atlanta v. Stein*, 111 Ga 789, 36 SE 932; *Fiske v. People*, 188 Ill 206, 58 NE 985; *State ex rel. Robert Mitchell Furniture Co. v. Toole*, 26 Mont. 22, 66 P. 496; *State ex rel. United Dist. Heating, Inc. v. State Office Bld. Com.* 124 Ohio St 413, 179 NE 138, 80 ALR 1376, mandamus allowed 125 Ohio St 301, 181 NE 129, 80 ALR 1379 (holding that a discrimination against a bidder for public work, upon the ground of his intended employment of workmen without regard to their affiliation or non-affiliation with labor unions, will not be permitted); *Electric Appliance Co. v United States Fidelity & G. Co.* 110 Wis. 343, 85 NW 648.

A statute providing that specified work of municipalities shall be done by union labor is invalid. *Wright v. Hoctor*, 95 Neb 342, 145 NW 704, 146 NW 997.

[15] *Adams v. Brenan*, 177 Ill. 194, 52 NE 314.

upon a bid tendered pursuant to an advertisement limiting the right to bid to persons employing, or who would in the future employ, union labor only,[16] while others have held that bidders for public contracts are entitled to ignore provisions in specifications or advertisements for bids requiring that only union labor shall be employed in the work.[17]

A statute requiring that public work shall be done only by union labor has been declared void as undemocratic in plan and contrary to the spirit of our republican form of government.[18] Likewise, in a number of instances, municipal ordinances or resolutions providing in effect that public contracts shall be let only to contractors employing union labor, and stipulations in contracts of municipal corporations requiring employment of union labor, have been held invalid. Such ordinances have been declared void as making unconstitutional discrimination between classes of citizens and because they lay down rules which restrict competition and increase the cost of work.[19]

The Labor Agreement clearly requires as part of MWRA policy[20] that the successful bidder become signatory to the agreement. There is, in fact, no question that a bidder must become signatory to this collective bargaining agreement or face automatic rejection. This requirement violates the N.L.R.A.; furthermore, it is legally irrelevant that the collective bargaining agreement is site-specific rather than a general collective bar-

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[16] *State ex rel. Robert Mitchell Furniture Co. v. Toole*, 26 Mont. 22, 66 P. 496.

[17] *Marshall & B. Co. v. Nashville*, 109 Tenn 495, 71 SW 815.

[18] *Wright v. Hoctor*, 95 Neb. 342, 145 NW 704, 146 NW 997.

[19] *Atlanta v Stein*, 111 Ga. 789, 36 SE 932; *Miller v Des Moines*, 143 Iowa 409, 122 NW 226; *Electric Appliance Co. v. United States Fidelity & G. Co.*, 110 Wis. 434, 85 NW 648.

[20] See p. 1 of Labor Agreement.

gaining agreement because it is the nature of the agreement and not its scope or duration which violates the act.

The following case citations given by Kaiser and the MWRA are unpersuasive and clearly distinguishable from the instant case on the facts.

In *Morrison-Knudsen Co., Inc.* 13 AMR 23, 061(1986), a pre-hire agreement was entered into by the construction manager for Saturn Corporation (Morrision-Knudsen Co., Inc.) for the Saturn automobile facility in Spring Hill, Tennessee. The Saturn Automobile facility was not a public works project; thus this case is factually different from the MWRA matter. Because the project was a private construction project, Morrison-Knudsen could be hired as the prime contractor and thus enter into a valid pre-hire agreement under 29 U.S.C.A., 158(f). Similarly in *Associated Builders and Contractors of Kentuckiana, Inc. and River City Development Corporation v. Ohbayashi Corporation*, Civil Action No. 87-38 (E.D. Ky. Oct. 26, 1987), the court held that a private company could enter into such a pre-hire agreement; however, this case is a matter involving private, not public, construction. In public construction, a municipality, as a matter of law, cannot be an employer within the N.L.R.A. definition of employer and hence cannot enter into a valid pre-hire agreement. Moreover, in the instant matter, Kaiser is not the prime contractor (by law the prime contractor is the lowest responsible and eligible bidder), nor can it bind the prime contractor (lack of privity between Kaiser and the prime contractor.).

Accordingly, the cases cited by the MWRA and Kaiser are inapposite.

EVEN IF THE INSTANT LABOR AGREEMENT WERE PERMITTED UNDER THE N.L.R.A., THE STATUTORY REQUIREMENTS OF M.G.L. C.30, S.39M AND C.149, SS. 44A-44J WOULD PROHIBIT SUCH AN AGREEMENT.

A. *MASSACHUSETTS CASE LAW PROHIBITS THE FAVORING OF A UNION BY REQUIRING MEMBERSHIP OR BEING SIGNATORY TO A COLLECTIVE BARGAINING AGREEMENT.*

The S.J.C. has held that the requirement of union membership or of being signatory to a collective bargaining agreement cannot be a precondition for obtaining a public contract. See *Goddard v. City of Lowell* 61 N.E. 53 (1901). (A requirement that a printer be authorized to use the union logo in the performance of public printing held to violate law because the requirement favored unions).

Similarly, in *Modern Continental v. Mass Port Authority*, 343 N.E. 2d 362 at 364 (1976), the S.J.C. expressly stated:

> It should be noted that this is not a case in which a public body has restricted bidding for contracts within its domain to unionized firms only [cases cited]. As the trial judge correctly held, unionism is not a statutory requirement to be deemed "responsible" or "eligible," as those terms are used in G.L. c.30, s.39M, and the statute itself would bar the automatic exclusion of any bidder on the sole ground that the bidder employs nonunion workers.

It is noteworthy that in this case the S.J.C. allowed an awarding authority to reject all bids and re-bid a project, *where after investigation* the authority determined that there was a real and significant possibility of labor unrest if the project were awarded to the nonunion low bidder. Nothing in this case allows the awarding authority to arbitrarily reject a bidder for not being a union contractor nor does the case allow the awarding authority to reject only the low bidder and to award to a higher union bidder.

Modern Continental v. Mass. Port Authority is dispositive of the instant matter because the Labor Agreement expressly requires that a contractor become signa-

tory to a collective bargaining agreement in order for the contractor to obtain a public works construction contract,[21] exactly the situation which the S.J.C. ruled would violate c.30, s.39M (and, by implication, c.149, ss.44A-44J). It is legally irrelevant that the Labor Agreement is limited to the construction site and to the duration of the project. The effect of the Labor Agreement is to restrict those public works construction contracts to signatories of the collective bargaining agreement (*i.e.*, union firms). It is a condition of the Labor Agreement that no firm other than one who executes the Agreement can obtain the construction contract.

In *Rudolph v. City Manager of Cambridge*, 341 Mass. 31 (1960), the S.J.C. refused to permit an awarding authority to reject an otherwise competent low bidder on the basis of a local preference ordinance and award instead to a higher bidder. "The statute read as a whole shows an unmistakable intent that the power of the awarding authority to require the rejection of a sub-bid, which is in all formal aspects satisfactory, in favor of a higher available bid, may be exercised only for lack of competence of the rejected bidder." *Id.* at 35.

The Labor Agreement and MWRA policy similarly create an impermissible preference which violates the bid law by imposing the additional requirement of union recognition, thereby changing the statutory requirement of competency based only on bidder "eligibility" and "responsibility." As the S.J.C. made clear in *Rudolph*, it is *never* in the public interest to create an exclusionary policy favoring one group or type of bidder.

In *Alpert v. Springfield Bldg. and Contr. Trades Council*, 156 F. Supp. 754, (D. Mass. 1957), the federal district court specifically held that the harmony provisions of M.G.L. c.149, s.44A, which require a bidder to certify that he is able to furnish labor that can work in harmony

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[21] Labor Agreement, Article II, Section 2(a), p. 5.

with other labor employed was not intended to legalize action which is in violation of National Labor Relations Act provisions relative to strikes, the object of which is to force any employer to cease doing business with any other person. *Modern Continental v. Mass. Port Authority, supra,* cannot and does not stand for the proposition that an illegal action which violates federal law (the N.L.R.A.) is permissible in the Commonwealth; on the contrary, the S.J.C. expressly stated in that case that "the [public bidding] statute itself would bar the automatic exclusion of any bidder on the sole ground that the bidder employs nonunion workers." *Id.* at 364. It is important to remember that this Labor Agreement is in violation of the N.L.R.A. and thus illegal under both federal law and Massachusetts decisional law.

B. *THE MWRA MAY NOT USE THE HARMONY CLAUSE CONTAINED IN THE COMPETITIVE BIDDING STATUTES TO CHANGE THE STATUTORY MEANING OF THE WORDS ELIGIBLE AND RESPONSIBLE*

C.30, s.39M(c) defines lowest "responsible and eligible" bidder as:

> The bidder (1) whose bid is the lowest of those bidders possessing the skill, ability and integrity necessary for the faithful performance of the work (2) who shall certify that he is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed in the work . . .

Similarly, c.149, s 4A defines "responsible and eligible" bidder as follows:

> "Responsible" means demonstrably possessing the skill, ability and integrity necessary to faithfully perform the work called for by a particular contract, based upon a determination of competent workmanship and financial soundness in accordance with the provisions of section forty-four D of this chapter;

> "Eligible" means able to meet all requirements for bidders or offerors set forth in sections forty-four A through forty-four H of this chapter and not debarred from bidding under section forty-four C of this chapter or any other applicable law, and who shall certify that s/he is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed on the work.

Both statutes require certification that the bidder can work in harmony with all other elements of labor. This provision (the harmony clause) necessarily contemplates both union and nonunion labor working in close proximity on the same project. *Modern Continental v. Mass. Port Authority, supra* at 364 makes that express holding: "The 'harmony' clause of the statute speaks of the bidder providing 'labor that can work in harmony with all other elements of labor employed or to be employed in *the work*' (s. 39M[c]), and clearly contemplates a situation in which the union and nonunion workers work in some type of proximity to one another." To accept the MWRA's interpretation of *Modern Continental v. Mass. Port Authority, supra*, and the harmony clause contained in both M.G.L. c.30, s.39M and c.149, s.44A, would be to render the phrase "in harmony with all other elements of labor" surplusage, as the MWRA's interpretation of that phrase is harmony created through exclusivity of union contracting.

A statute should be interpreted so as to give meaning to all the words in context; none of the words should be regarded as superfluous. *Commonwealth v. Woods Hole, Martha's Vineyard & Nantucket S.S. Authority*, 352 Mass. 617, 618(1967). *School Comm. of Stoughton v. Labor Relations Comm'n.*, 4 Mass. App. 262, 269(1976). Furthermore, the statute must be construed in "light of the legislative objectives which were served by its enactment so as to effectuate the purpose of the framers. *Interstate Eng. Corp. v. Fitchburg*, 367 Mass. at 757 (1975). The S.J.C. has stated repeatedly that "The pur-

pose of competitive bidding statutes is not only to ensure that the awarding authority obtain the lowest price among responsible contractors, but also to establish an *open* and *honest* procedure for competition for public contracts." *Modern Continental v. City of Lowell*, 391 Mass. 829, 835(1984). See also *Mari and Sons Flooring Co. v. Southeastern Mass. Univ. Bldg. Authy.*, 3 Mass. App. 580(1975). A policy which discriminates against nonunion contractors in preference for union contractors fosters the kind of favoritism which competitive bidding was designed to eliminate. *Interstate Engineering v. Fitchburg, supra.*

Thus the MWRA's position regarding harmony is incorrect given the public bidding scheme, case law and principles of statutory construction, as well as the principles of contract law. (See Section A above). In other words, the MWRA's position is just as untenable as if it were seeking to hire only nonunion contractors and works.

C. *THE MWRA CANNOT USE ITS AUTHORITY TO REJECT ANY OR ALL BIDS TO REQUIRE BIDDERS TO SIGN A COLLECTIVE BARGAINING AGREEMENT*

Neither the reservation of a right to reject any and all proposals in the notice to contractors of bidding on a public construction project, nor the possibility that some violation of former ss.44A to 44L of this chapter might result in a benefit to the public, warrants disobedience of the statutory mandate. *Commonwealth v. Gill*, 5 Mass. App. 337(1977). See also *Rudolph v. City Manager of Cambridge, supra*, in which the S.J.C. rejected the argument that it was in the public interest for an awarding authority to give a preference to a certain class of bidders.

Nor is it dispositive that the determination as to who is the lowest responsible and eligible bidder belongs to the

awarding authority. Such a determination will not withstand judicial scrutiny where the determination is illegal, arbitrary, or capricious. *Capuano v. School Building Committee of Wilbarham*, 330 Mass. 494 (1953). See also *Kopelman v. U. Mass. Bldg. Authority*, 363 Mass. 463 (1973) (Court acts if agency acted unlawfully, or . . . arbitrarily, capriciously, or in abuse of its discretion). Clearly, a determination of the lowest responsible and eligible bidder predicated upon the Labor Agreement cannot survive judicial scrutiny.

D. *AN AWARDING AUTHORITY MAY INCLUDE IN ITS SPECIFICATIONS REQUIREMENTS BEYOND THE STATUTORY MINIMUM PROVIDED THEY ARE NEITHER ILLEGAL NOR CONTRAVENE THE STATUTORY BIDDING SCHEME*

Builders Realty Corp. of Mass. v. Newton, 348 Mass. 65 (1964) holds that an awarding authority may impose requirements beyond the statutory minimum and add other requirements to the specifications as long as those additional requirements are not illegal, unreasonable or in violation of the statutory scheme. Moreover, officers of governmental agencies have authority to bind their governmental bodies only to the extent conferred by their controlling statute. Contract provisions which go beyond the scope of the controlling statute are void. *White Construction Co., Inc. v. Commonwealth*, 385 Mass. 1005 (1981).

It is clear that the instant Labor Agreement, in violating the N.L.R.A., is illegal. It is equally clear from its enabling legislation, M.G.L. c.92 App. s.1-8(g), that the MWRA is subject to the requirements of both bidding statutes (M.G.L. c.149, s.44A-44J, and c.30, s.39M) for public works construction and that the instant Labor Agreement violates both statutes.

Both statutes define the qualifications necessary for the low bidder to obtain award of a contract for construction.

M.G.L. c.30, s.39M defines these qualifications under the terms "eligible and responsible" as follows:

> (c) The term "lowest responsible and eligible bidder" shall mean the bidder (1) whose bid is the lowest of those bidders possessing the skill, ability and integrity necessary for the faithful performance of the work; (2) who shall certify that he is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed in the work; (3) who, where the provisions of section eight B of chapter twenty-nine apply, shall have been determined to be qualified thereunder; and (4) who obtains within ten days of the notification of contract award the security by bond required under section twenty-nine of chapter one hundred and forty-nine; provided that for the purposes of this section the term "security by bond" shall mean the bond of a surety company qualified to do business under the laws of the commonwealth and satisfactory to the awarding authority.

M.G.L. c.149, s.44A(1) defines "eligible" and "responsible" as follows:

> "Eligible" means able to meet all requirements for bidders or offerors set forth in sections forty-four A through forty-four H of this chapter and not debarred from bidding under section forty-four C of this chapter or any other applicable law, and who shall certify that s/he is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed on the work.
>
> "Responsible" means demonstrably possessing the skill, ability and integrity necessary to faithfully perform the work called for by a particular contract, based upon a determination of competent workmanship and financial soundness in accordance with the provisions of section forty-four D of this chapter;

M.G.L. c.30, s.39M requires that the contract be awarded to "the lowest responsible and eligible bidder on the basis of competitive bids publicly opened and read by such awarding authority . . ." M.G.L. c.149, s.44A(2) likewise mandates that "Every contract for construction . . . . shall be awarded to the lowest responsible and eligible general bidder on the basis of competitive bids in accordance with the procedure set forth in the provision of section forty-four A to forty-four H, inclusive."

Both statutes set forth the responsibilities of awarding authorities in determining who the lowest responsible and eligible bidder is on each project. C.30, s.39M, requires that an awarding authority make its determination based upon an investigation conducted by the awarding authority after bids are opened. This post bid qualification focuses on whether or not the bidder meets the statutory definition of lowest responsible and eligible bidder under s.39M (c), *supra*. M.G.L. c.149, s.44D sets forth a statutory scheme for pre-qualification of general bidders by the Division of Capital Planning and Operations (D.C.P.O.). Under this scheme, a general bidder submitting a valid certificate of eligibility issued by D.C.P.O. is presumed qualified, absent a determination based on information contained in the statutorily required update statement that the bidder is no longer qualified.

The Labor Agreement in question changes the statutory definition of "lowest responsible and eligible bidder" in both statutes by adding the requirement that a general bidder be willing and able to sign a pre-hire agreement for union recognition on the project. Neither statutory definition (contained in c.149, s.44A, and c.30, s.39M) requires union recognition as a condition of award of a construction contract. Indeed, the statutory scheme contemplates award to competent contractors *without further restriction on qualifications* (*i.e.*, union or nonunion contractors). *Modern Continental v. Mass. Port Authority*, *supra* at p.364 specifically held: ". . . unionism is not a

statutory requirement to be deemed "responsible" or "eligible," as those terms are used in G.L. c.30, s.39M, and the statute itself would bar the automatic expulsion of any bidder on the sole ground that the bidder employs nonunion workers."

The decision in *Modern Continental v. Mass. Port Authority, supra*, is dispositive of the question as to whether or not a bidder may be required to be a union firm in order to bid or to be awarded a contract and is in accord with a long and consistent line of cases which determine the requirements of the public bid laws of this Commonwealth.

Statutory bidding procedures are designed to prevent favoritism, to secure honest methods of letting contracts in the public interest, to obtain the most favorable price, and to treat all persons equally. See *Modern Continental v. Lowell*, 391 Mass. 829 (1984); *Datatrol, Inc. v. State Purchasing Agent*, 379 Mass. 679, 696-697 (1980); *Interstate Eng'g Corp. v. Fitchburg*, 367 Mass. 751, 757-758 (1975); *Morse v. Boston*, 253 Mass. 247, 252 (1925); *James J. Welch & Co. v. Deputy Comm'r of Capital Planning and Operations*, 387 Mass. 662, 666 (1982).

Moreover, in *Modern Continental v. City of Lowell, supra* at 836 the S.J.C. held that bidder prequalification is no mere formality; it is a cornerstone of the competitive bidding statute. As such, any specification which affects bidder qualification or the statutory scheme for bidding of public works construction is in violation of the public bid laws.

It is clear that the Labor Agreement as currenty written exceeds the MWRA's authority, affects statutory bidder qualification requirements, reduces meaningful competition, is exclusionary (nonunion bidders cannot obtain any contract), promotes favoritism (promotes union over nonunion) and is thus in violation of the law. It is a specious argument that everyone is free to bid and that

therefore the process is not exclusionary; only contractors who become signatory to the Labor Agreement can obtain the contract;[22] a contractor's refusal to execute the agreement results in automatic disqualification and award to the next highest bidder.

THE LABOR AGREEMENT AS PRESENTLY WRITTEN VIOLATES THE REQUIREMENTS OF M.G.L. C.149, S.44F (THE FILED SUB-BID LAW)

M.G.L. c.149, s.44F specifically requires that all filed sub-bidders customarily perform all their sub-tradework with their own employees. Except for specialty work which under current trade practices is customarily sub-sub contracted, the sub-bidder is required to install all materials himself: "Each separate section in the specifications . . . *shall require the subcontractor to install all materials* to be furnished by him under such section." c.149, s.44F(1).

The statutory form for sub-bid (signed under penalties of perjury), as prescribed by c.149, s.44F(2), reiterates the requirement that each sub-bidder must himself perform *all* of his sub-trade work and may not subcontract the work out to another contractor: "The undersigned [*i.e.*, the filed sub-bidder] proposes to *furnish all labor* and materials required for completing . . . *all* the work specified. . . . [emphasis added]."

Section 6 of c.4 provides that words and phrases in a statute shall be construed according to the common and approved usage of the language. The plain language is founded on the presumption that the Legislature meant what the words in a statute plainly say. *State Board of*

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[22] See Article II, Section 2(a), p. 5, of the Labor Agreement: The MWRA has the "absolute right to select any qualified bider for the award of contracts on this Project . . . provided, however, only that such bidder is willing, ready and able to execute and comply with the [Labor Agreement], should it be designated the successful bidder."

Retirement v. Boston Retirement Board, 391 Mass. 92, 94 (1984). A statute's language is the primary source of its meaning, and when the statute is unambiguous, it must be construed as written. *Zoning Board of Appeals of Greenfield v. Housing Appeals Committee*, 15 Mass. App. Ct. 533, 562 (1983).

The plain language of c.149, s.44F, absolutely mandates that the *filed sub-bidder* (not any sub-contractor) *shall* install *all* materials (except for specialty work customarily sub-subcontracted in the trade). It is a well-settled rule of statutory construction that the word *shall* ordinarily indicates that a statutory provision containing directions to public officers is mandatory. *Hashimi v. Kalil*, 388 Mass. 607, 609-10 (1983).

Two Massachusetts cases, *Burgess & Blacher Company v. Beverly Housing Authority*, 351 Mass. 88 (1966) and *Quincy Ornamental Iron Works, Inc. v. Findlen*, 353 Mass. 85 (1967) hold that a filed sub-bidder must customarily perform the work of the sub-trade with his own employees and that an awarding authority must conduct an investigation to determine that a sub-bidder does so perform prior to award of a contract. Any filed sub-bidder who does not perform with his own employees is not eligible for award.

Neither the statute nor case law defines the meaning of the phrase "with his own employees"; accordingly, under the rules of statutory construction, the statute must be interpreted according to the intent of the legislature, as ascertained from all its words, construed by ordinary and approved usage of language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied, and main object to be accomplished, to the end that the purpose of its framers may be effectuated. *Comm. v. Galvin*, 388 Mass. 326 (1983).

Both the MWRA and Kaiser acknowledge in their brief that the purpose of the requirement in s.44F is "to pre-

vent sub-bidders from letting out the work to non-bidders . . .[23] The intent is clearly to prevent sub-sub-bidding, or brokering of a filed sub-bid.[24]

The MWRA and Kaiser argue that in order to meet the statutory requirement, a filed sub-bidder merely needs to add a worker to his payroll. Their contention is that a filed sub-trade contractor may hire his entire work force from a union hall or from the street and satisfy the requirement that he customarily perform with his own employees.

However, such an interpretation leaves the filed sub-bidder as nothing more than a broker and provides a simple vehicle for sub-sub-contracting a filed sub-bid contract. Under the MWRA and Kaiser's theory, a filed sub-bidder easily could evade the intent of the statute by hiring an entire crew of another contractor, the contractor and his equipment and putting them on his payroll. This scenario would make the other company and its employees "employees" of the sub-bidder. This interpretation would render the statute nugatory or make it impossible to administer. Such interpretations are not favored by Massachusetts courts. See *Hein-Werner Corp. v. Jackson Industries*, 364 Mass. 523 (1974) (Construction of statute which would effectively nullify or make it impossible to administer are not to be favored.).

Even assuming that MWRA and Kaiser are correct that it is the industry practice for subcontractors to customarily hire their workers after obtaining a contract, the practice is irrelevant in interpreting Massachusetts law. The majority of work performed in the construction trade does not involve public works construction and nothing in general contract law would prohibit such a practice in private construction. The legislative intent in

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[23] Brief, p. 16.

[24] This Department routinely prosecutes contractors who illegally sub-subcontract filed sub-tradework.

enacting the statute requiring competitive bids for contracts for public works construction was to protect the public. *Grande & Son, Inc. v. School Housing Committee of North Reading*, 334 Mass. 252 (1956).

The intent of the statutory requirement presupposes an existing work force for the filed sub-bidder which may be supplemented if the need arises. It is this work force, the sub-bidder's employees, who must be used to perform the work. This requirement prevents brokering of subtrade contracts and assures quality work by trained workers.

There is a vast difference between supplementing an already existing work force and obtaining an entirely new workforce in the performance of a public works construction contract because it is the filed sub-bidder who is responsible for the quality of his work. Any inadequate performance by the filed sub-bidder can result in debarment from further public work contracts.

The requirement in the Labor Agreement that subbidders use employees exclusively from the union hiring hall violates M.G.L. c.149, s.44F.

THE MASSACHUSETTS SUPREME JUDICIAL COURT HAS STRICTLY CONSTRUED THE REQUIREMENTS OF THE PUBLIC BID LAW

The S.J.C. consistently has stricken down specifications which violate the statutory scheme set forth in M.G.L. c.149, s.44A-44J and c.30, s.39M.

> . . . The general rule in this Commonwealth is that failure to adhere to statutory bidding requirements makes void a contract entered into without such compliance. *Phipps Prods. v. M.B.T.A.*, 387 Mass. 687 (1982). Statutory bidding procedures are designed to prevent favoritism, to secure honest methods of letting contracts in the public interest, to obtain the most favorable price, and to treat all persons equally See *Modern Continental v. City of*

Lowell, 391 Mass. 829(1984), *Datatrol, Inc. v. State Purchasing Agent*, 379 Mass. 679, 696-697(1980); *Interstate Eng's Corp. v. Fitchburg*, 367 Mass. 751, 757-758; *Morse v. Boston*, 253 Mass. 247, 252(1925). To effectuate these purposes, as the opinions just cited show, contracts made in violation of bidding requirements have generally been held to be unenforceable. See *Adalien Bros. v. Boston*, 323 Mass. 629, 631-632(1949); *Burt v. Municipal Council of Taunton*, 272 Mass. 130, 133-134(1930) *Safford v. Lowell*, 255 Mass. 220, 227(1926); *Bowditch v. Superintendent of Streets of Boston*, 168 Mass. 239, 243(1897). This court has requird strict adherence to bidding requirements even where no harm to the public authority was shown (*Bowditch v. Superintendent of Streets of Boston, supra* at 244[1926]; where the violation benefited the public (*Grande & Son v. School Hous. Comm. of N.Reading*, 334 Mass. 252, 258[1956]; *East Side Constr. Co. v. Adams*, 329 Mass. 347, 352 [1952]); and where there was no showing of bad faith or corruption (*Gifford v. Commissioner of Pub. Health*, 328 Mass. 608, 617[1952]).

Similarly, a Labor Agreement which chills the open and honest competition mandated by *Interstate, supra* and *Modern Continental v. Lowell, supra*, by restricting eligible bidders to those "willing, ready and able to execute and comply with" such an agreement will be stricken down because it violates the statutory mandate by monopolizing the work. Massachusetts case law compels such a finding of violation of the competitive bidding statutes.

THE INSTANT MATTER IS LEGALLY DISTINGUISHABLE FROM PRIOR DEPARTMENTAL DECISIONS INVOLVING MBE & WBE REQUIREMENTS

There are legal precedents which require affirmative action programs where federally assisted construction projects are involved. See *Contractors Association of*

Eastern Pennsylvania v. Shultz, 311 F. Supp. 1002 (1970) (upholding the "revised Philadelphia Plan" which implemented the Presidential Executive Order No.11246). In *Associated General Contractors of Mass., Inc. et al. v. Alan Altshuler et al.*, U.S. Court of Appeals, First Circuit, 490 F.2d 9 (1973), the Court upheld as constitutional the inclusion of affirmative action language in public construction contracts of the Commonwealth as a remedy for racial discrimination under the Fourteenth Amendment of the U.S. Constitution. The Department's prior decisions were based upon this legal precedent.[25]

No such legal precedents exist which allow the type of exclusionary agreement proposed by the MWRA and Kaiser Engineers in the Labor Agreement which MWRA seeks to implement.

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[25] The U.S. Supreme Court's recent decision in *Richmond v. Croson*, 109 S.Ct. 706 (1989), makes such mandatory minority set-aside provisions in construction contracts illegal, absent proof of actual discrimination.

MARYLAND TRANSPORTATION AUTHORITY

[EMBLEM]

BALTIMORE HARBOR TUNNEL THRUWAY

PROPOSAL FORM

CONTRACT NO. BRB 9-932

REHABILITATION & WIDENING OF THE BAYVIEW YARDS BRIDGE

BALTIMORE CITY

JANUARY, 1987

MARYLAND TRANSPORTATION AUTHORITY LABOR STABILIZATION AGREEMENT

THIS AGREEMENT, made this 31st day of October, 1986 by and between the Maryland Transportation Authority an Agency of the State of Maryland (hereinafter referred to as the "Authority") and the Baltimore Building and Construction Trades Council, AFL-CIO (hereinafter referred to as "Unions").

WITNESSETH:

WHEREAS, the successful completition of the Baltimore Harbor Tunnel Rehabilitation Project is of the utmost importance to the general public in the Baltimore Metropolitan area; and

WHEREAS, during the construction of the Baltimore Harbor Tunnel Rehabilitation Project, large and varied segments of population will be directly and indirectly involved; and

WHEREAS, the contracts for the Baltimore Harbor Tunnel Rehabilitation Project will be awarded in accordance with the competitive bidding provisions and requirements of the State of Maryland, and

WHEREAS, the work to be done will require maximum cooperation from the many groups which will be involved; and

WHEREAS, large numbers of skilled and unskilled workmen will be required in the performance of the construction work, and recognizing that in all likelihood many of such skilled and unskilled workmen will be represented by unions affiliated with the Baltimore Building and Construction Trades Council, AFL-CIO (including the Brotherhood of Teamsters) and employed by contractors who are signatory to collective bargaining agreements with said labor organizations; and

WHEREAS, it is recognized that on a Project of this magnitude, spreading over an area with multiple labor contracts and employer associations, jurisdictional disputes or conflicts of interest could delay or disrupt orderly completion of the Project; and

WHEREAS, the interests of the general public, the Authority, the Unions and contractors require that the construction program proceed in an orderly manner without disruptions because of work stoppages of any kind, jurisdictional disputes or labor strife.

NOW, THEREFORE, IT IS AGREED between the parties hereto as follows:

ARTICLE I

DEFINITIONS

1. The term "Authority" means the Maryand Transportation Authority, an agency of the State of Maryland, or its authorized agent.

2. The term "Baltimore Harbor Tunnel Rehabilitation Project" or "Project" means the rehabilitation of the Baltimore Harbor Tunnel (TFA-2-9700-50), The Baltimore Harbor Tunnel Toll Plaza (TFA-2-9720-50), the Bayview Yards Bridge (BRB 9-932), The Boston Street, O'Donnell Street, Canton Railroad and Lombard Street Bridges (TFA-2-9760-50R), and the reconstruction of portions of the Patapsco Avenue, Potee Street, Shell Road and Child Street Bridges and ramps (TFA-2-9740-50) as defined within the geographical limits of the contract documents.

3. The term "UNIONS" means the Baltimore Building and Construction Trades Council, AFL-CIO and its affiliate local unions signatory hereto.

4. The term "EMPLOYERS" means those Employers who become signatory to this Construction Labor Stabilization Agreement or who are or become signatory to a

collective bargaining agreement with any Union affiliated with the Balitmore Building and Construction Trades Counsil, AFL-CIO whose agreement is applicable within the geographical area covered by the Baltimore Harbor Tunnel Rehabilitation Project.

5. The term "CONSTRUCTION WORK" means all onsite work (including demolition) necessary to the construction of said Project which is within the recognized jurisdiction of the Unions signatory hereto. It is recognized and agreed by the parties hereto that the construction work for the Baltimore Harbor Tunnel Rehabilitation Project will be let in accordance with the competitive bidding procedures of the State of Maryland.

ARTICLE II

PURPOSE

The purpose of this Agreement is to insure that all construction work on the Baltimore Harbor Tunnel Rehabilitation Project shall proceed economically, efficiently, continuously without interruption and with due consideration for the protection of labor standards, wages and working conditions.

The "Authority", "Employers" and "Unions" do establish and put into practice effective and binding methods for the settlement of all misunderstandings, disputes or grievances that may arise between the Authority, Employers and Unions or its members to the end that the Authority, Employers and Unions are assured of complete continuity of operations, without slow-down or interruption of any kind, and that labor-management peace is maintained.

ARTICLE III

SCOPE OF AGREEMENT

This Construction Labor Stabilization Agreement shall be applicable to all contractors performing onsite construction work on the Baltimore Harbor Tunnel Rehabili-

tation Project, also designated as I-895, but it shall not be applicable to work performed under a legitimate manufacturer's warranty or work performed offsite.

This Agreement is not intended to, and does not cover the operation or maintenance of the Baltimore Harbor Tunnel.

This Agreement shall not apply to executives, managerial employees, engineering employees (including inspectors), supervisors (except those covered by existing collective bargaining agreements), timekeepers, office and clerical employees or employees in confidential positions.

It is the intent of this Agreement to comply with all applicable federal, state and local laws and regulations and nothing in this Agreement shall limit the selection or utilization of contractors or subcontractors to perform construction work on the Project; provided, however, that all such contractors shall comply with the terms of this Agreement.

This Agreement is not intended to supersede collective bargaining agreements between an Employer performing construction work on the Baltimore Harbor Tunnel Rehabilitation Project and a union, except to the extent that the provisions of the Agreement are inconsistent with said collective bargaining agreement, in which latter event, the provisions of this Agreement shall apply.

ARTICLE IV

EFFECT OF AGREEMENT

(a) By executing this Agreement, Unions agree to be bound by each and all of the provisions herein. By accepting any award of construction work, either as contractor or subcontractor (of any level or tier), on any part of the jobsite of the Project, each Employer agrees (i) to be bound by each and every provision of his Agreement, (ii) to execute, either personally or through a duly author-

ized agent (in the form set forth in either Exhibit A or Exhibit B hereto) its agreement to that effect, and (iii) to require that any Employer which is a subcontractor to it agree in writing (in form set forth in either Exhibit A or Exhibit B hereto) to be bound by the terms of this Agreement.

(b) This Agreement is not intended to supersede existing collective bargaining agreements already in existence or hereafter executed between an Employer performing work on the Project and a Union, except to the extent the provisions hereof are directly inconsistent therewith.

(c) Nothing in this Agreement shall affect territorial jurisdiction as between the signatory Unions. Such territorial jurisdiction is recognized as defined by the signatory Unions.

ARTICLE V

WORK STOPPAGE AND LOCKOUTS

(a) There shall be no strikes, work stoppages, picketing, handbilling, public notices, or slowdowns of any kind, for any reason, or threats of any kind to engage in such conduct, by the Unions or employees against the Employers. Neither the Union nor any of its members shall commit any act whatsoever, including picketing, handbilling and public notices, to cause or attempt to cause any work interruption or slowdown of any kind at the Project jobsites.

(b) Similarly, there shall be no lockout of any kind, or threats to engage in a lockout by an Employer covered by this Agreement.

(c) In the event that the Project work is not completed by an Employer by the termination date of its current collecitve bargaining agreement between the Employer and the Union, and the Union gives notice of demands for a new or modified collective bargaining agreement after said termination date, the Union agrees that it

will not strike the Employer on said Project and that the said current collective bargaining agreement as changed or modified shall continue in full force; and the Employer agrees that when the Union consummates a new or modified collective bargaining agreement with the Employer with which it negotiates collective bargaining agreements, the Employer shall adopt said agreement as its own agreement with the Union and shall pay all the new wage rates, and fringe benefit contributions, and shall apply all other terms and conditions of employment contained in said new agreement between the said Employer and the Union retroactively to the termination date of said current agreement between the Employer and the Union with respect to the employees represented by the Union and employed on said Project.

(d) In the event of a strike or lockout in violation of this Article, the grievance and arbitration procedure set forth in Article IX hereof shall not be the exclusive remedy therefore and no party hereto shall be required, as a condition of commencing or maintaining any action at law or equity, to process the claim for such violation under said grievance and arbitration procedure.

ARTICLE VI

JURISDICTIONAL DISPUTES

Jurisdictional disputes over the division of work between crafts shall be settled in accordance with the procedural rules and regulations of the Joint Administrative Committee under the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry, effective June, 1984. There shall be no strikes, work stoppages, slowdowns or interference with the progress of the work on the Project by reason of jurisdictional disputes.

In an effort to eliminate as many jurisdictional problems as possible, the Employer, prior to starting any work on the Project must engage in pre-assignment (mark-up)

meetings with the business representatives of the various local unions to reach agreement on all anticipated work assignments. The parties will resolve all differences by negotiation and discussion. General work items of jurisdiction shall also be established and agreed to, before work on the Project is started.

There shall be no actual or threatened work stoppage, work interruption, strike, picketing, handbilling, or public notice of any kind in connection with any jurisdictional dispute, or if a Union or an Employer fails to immediately and fully comply with the decision in any jurisdictional dispute, the provisions of this Article shall immediately become null and void insofar as that particular dispute is concerned and the Authority, Employer or Union shall have the immediate right to seek full legal redress for such conduct.

ARTICLE VII

MANAGEMENT RIGHTS

Employers retain full and exclusive authority for the management of their respective operations subject to Article VI, VII and IX of this Agreement. Except as expressly limited by the provisions of this Agreement, an Employer may direct its working forces at its sole prerogative, including hiring, selection or supervision, promotion, transfer, layoff or discharge. An Employer shall have the right to utilize any work methods, procedures or techniques of construction. No rules, customs or practices shall be permitted or observed which in any way limit the selection or use of materials and equipment. The Employer shall schedule the work and shall determine the overtime and manpower requirements necessary to perform the work.

Because of the peculiar nature of the Project, only limited means of access will be available to the jobsites.

Any Employer subject to this Agreement hereby agrees: (1) that he shall employ each of his employees to do work only within the classification of employment designated by the Employer at the time of said employee's initial employment on this Project, it being understood that an Employer may, without limitation, shift an employee from a category within a particular classification to another category within the same classification and pay appropriate prevailing wages. An Employer may reassign an employee to a higher paying classification in which case the Employer shall have the employee do work only within categories of said higher paying classification for the duration of the instant construction contract: (2) he shall pay to each employee, at a minimum, the prevailing wage rate applicable to the classification. At the instance of any party to this Agreement of a complaint that (1) or (2) herein is being violated by any contractor or sub-contractor, the complaint shall be treated and considered as a grievance subject to the procedures of Article IX of this Agreement.

ARTICLE VIII

JOINT PROJECT LABOR COMMITTEE

A Joint Project Labor Relations Committee, consisting of a representative from the Authority and from each of the Employers and the Unions, shall be established for the Baltimore Harbor Tunnel Rehabilitation Project. Said Joint Project Labor Relations Committee shall meet, at intervals deemed appropriate or upon call, for the purpose of establishing work rules, and promoting harmonious labor relations on the Baltimore Harbor Tunnel Rehabilitation Project.

ARTICLE IX

GRIEVANCE PROCEDURE

Any question or dispute arising out of and during the term of this Agreement involving its interpretation and application (other than trade jurisdictional disputes re-

ferred to in Article VI hereof) or any actual or threatened work stoppages, lockouts, or picketing shall be handled under the following procedures:

Step 1

Any grievance must be submitted in writing to the other party within five (5) calendar days of its becoming known or it will be considered closed. Upon receipt of written notification from either party of a dispute which is, for the reasons herein above stated, unresolved, the other party shall, within a period not to exceed five (5) working days, make an effort to settle the dispute with the appropriate local union representative.

Step 2

If, within five (5) working days, the dispute remains unresolved, it will be settled by the International Union Area Representative and the designated Labor Relations Representative of the Employer.

Step 3

If within five (5) working days, the dispute remains unresolved, it will be settled by the President of the International Union or his representative and the home office Labor Relations Representative of the Employer.

Step 4

If the issue is not resolved within twenty (20) days, from the date of its original submission, the Employer and the Union involved shall request the Commissioner of Labor and Industry of the State of Maryland, or his specifically designated representative, to hear and determine the dispute. The Commissioner of Labor and Industry, or his representative, shall then hear the grievance at the earliest mutually convenient time. Each party shall have the right to present whatever evidence it deems desirable at any hearing. The decision of the Commissioner of Labor and Industry shall be final and binding upon all parties and any individual involved.

Any party shall have the right to have a transcript made of the proceeding at its own expense.

ARTICLE X

CONTINUOUS EMPLOYMENT OF EMPLOYEES

An employee assigned to work on a specific part of the Baltimore Harbor Tunnel Rehabilitation Project may be retained continuously by his Employer on such work without regard to geographic divisions of jurisdiction between any Unions.

ARTICLE XI

TERM OF AGREEMENT

This Agreement shall become effective on or prior to the award of the first construction contract for the Baltimore Harbor Tunnel Rehabilitation Project whichever comes first, and shall continue in full force and effect until the completion of the Baltimore Harbor Tunnel Rehabilitation Project as defined within the geographical limits of the contract documents. This Agreement shall continue in full force and effect from year to year thereafter unless either party advises the other, in writing, of a desire to terminate or modify this Agreement.

IN WITNESS WHEREOF, the parties hereto have affixed their signatures on the date first herein mentioned.

Approved as to form and legal sufficiency this — day of ——, 1986.

/s/ [Illegible]
Assistant Attorney General

SIGNATURE PAGE

BALTIMORE HARBOR TUNNEL REHABILITATION PROGRAM

MARYLAND TRANSPORTATION AUTHORITY

By: /s/ Anthony P. Frate
ANTHONY P. FRATE
Executive Secretary

BALTIMORE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO

By: /s/ Charles H. Reish

Signed in Baltimore, Maryland this 31st day of October, 1986

UNION:

/s/ [Illegible]
ASBESTOS WORKERS
LOCAL 11

/s/ [Illegible]
BOILERMAKERS
LOCAL 193

/s/ [Illegible]
CEMENT MASONS
LOCAL 43

/s/ [Illegible]
ELECTRICAL WORKERS
LOCAL 24

/s/ [Illegible]
ELEVATOR
CONSTRUCTORS
LOCAL 7

/s/ [Illegible]
OPERATING ENGINEERS
LOCAL 37

/s/ [Illegible]
IRONWORKERS
LOCAL 16

/s/ [Illegible]
LABORERS' DISTRICT
COUNCIL

/s/ [Illegible]
LEAD BURNERS
LOCAL 153

/s/ [Illegible]
MILLWRIGHTS
LOCAL 1548

/s/ [Illegible]
PAINTERS DISTRICT
COUNCIL NO. 23

/s/ [Illegible]
PLASTERERS' LOCAL 155

/s/ [Illegible]
PLUMBERS LOCAL 48

/s/ [Illegible]
ROOFERS LOCAL 80

/s/ [Illegible]
SHEET METAL
WORKERS LOCAL 100

/s/ [Illegible]
SPRINKLER FITTERS
LOCAL 536

/s/ [Illegible]
STEAMFITTERS
LOCAL 438

/s/ [Illegible]
TEAMSTERS LOCAL 311

AGREEMENT TO BE BOUND

The undersigned, as a contractor or subcontractor on the Baltimore Harbor Tunnel Rehabilitation Project, for and in consideration of the award to him of a contract to perform work on said Project, and in further consideration of the mutual promises made in the Maryland Transportation Authority Labor Stabilization Agreement, hereby:

(1) Accepts and agrees to be bound by the terms and conditions of the Maryland Transportation Authority Labor Stabilization Agreement, together with any and all amendments and supplements thereto, and accepts and agrees to bind any partnership or joint venture arrangements in which the undersigned may enter for the purpose of obtaining a contract to perform work on said Project.

(2) Certifies that he has no commitments or agreements which would preclude his full and complete compliance with the terms and conditions of said agreement.

(3) Agrees to secure from any Employer (as defined in said Agreement) which is a subcontractor (of any tier) to him a duly executed Agreement To Be Bound in form identical to this document or to Exhibit B attached to said Agreement.

Date: ....

By: .....

AGREEMENT TO BE BOUND

The undersigned, an Employer Association as defined in the Maryland Transportation Authority Labor Stabilization Agreement, as agent by and for those of its members listed below, for and in consideration of the award to one or more of such members of a contract to perform work on the Baltimore Harbor Tunnel Rehabilitation Project, and in further consideration of the mutual promises made in the Maryland Transportation Authority Stabilization Agreement, hereby:

(1) Warrants that it has the authority to execute this Agreement To Be Bound for and on behalf of its members listed below;

(2) For and on behalf of its members listed below, accepts and agrees to be bound by the terms and conditions of the Maryland Transportation Authority Labor Stabilization Agreement, together with any amendments and supplements thereto;

(3) Certifies that none of its members has any commitments or agreements which would preclude their full and complete compliance with the terms and conditions of said agreement;

(4) For and on behalf of its members listed below, agrees that each of such members as may be awarded work on the Baltimore Harbor Tunnel Rehabilitation Project shall secure from any Employer (as defined in said agreement) which is a subcontractor (of any tier) to him a duly executed Agreement To Be Bound in form identical to this document or to Exhibit A attached to said Agreement.

DATED: ....

BY: .....

Members Covered:

Supreme Court, U.S.
FILED
JUL 22 1992
OFFICE OF THE CLERK

Nos. 91-261 and 91-274

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, PETITIONER

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, INC., PETITIONERS

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

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QUESTION PRESENTED

The 1959 Congress amended the National Labor Relations Act ("NLRA") to safeguard the validity of master collective bargaining agreements that would bind all contractors and subcontractors on a construction project. In doing so, Congress acted to authorize the continued use of an arrangement, traditional in the construction industry, that developed to meet the industry's special needs for assured labor relations stability, adequate supplies of skilled labor, and fixed labor costs throughout the life of a project as a whole.

The question presented here is whether the NLRA impliedly denies state and local governments, when acting as owners and developers of their property, the right to seek the same kind of labor arrangements and economic advantages in developing their property that the NLRA allows to private property owners.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The majority and dissenting opinions of the *en banc* court of appeals are reported at 935 F.2d 345 and are reprinted at pp. 1a-48a of the Appendix to the *certiorari*

petition in No. 91-274 ("MWRA Pet. App."). The panel opinion of the court of appeals is reported at 135 L.R.R.M. (BNA) 2713. MWRA Pet. App. 49a-71a. The opinion of the district court is not reported. MWRA Pet. App. 72a-83a.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1991. Timely certiorari petitions were filed on August 12 and 13, 1991 and *certiorari* was granted on May 18, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, Article VI, Clause 2 of the Constitution, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land . . . .

Sections 8(e) and 8(f) of the National Labor Relations Act, 29 U.S.C. §§ 158(e) and (f), are reproduced at MWRA Pet. App. 143a-144a.

STATEMENT OF THE CASE

A. The Factual Background

1. *The Petitioners*

The Massachusetts Water Resources Authority ("MWRA" or the "Authority") is an independent state authority charged with providing water and sewer services to metropolitan Boston, with constructing and maintaining the facilities required for that purpose, and with financing those activities by current rates or borrowing. Mass. Gen. Laws c. 92 app. §§ 1-1 *et seq.*[1]

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[1] Although the Authority is within the Commonwealth's Executive Office of Environmental Affairs for administrative purposes, its

Kaiser Engineers, Inc. ("Kaiser") is a private construction contractor that manages large, complex construction projects for both public and private owners nationwide.

The Building and Construction Trades Council of the Metropolitan District (the "BCTC" or the "Council") is the principal local association of construction industry labor unions in the metropolitan Boston area. The BCTC participates in the negotiation of collective bargaining agreements on behalf of its affiliated unions.

2. *The District Court Order To Build The Boston Harbor Project*

In September 1985, the United States District Court for the District of Massachusetts ruled that MWRA, as successor to the Metropolitan District Commission, is liable under the Clean Water Act for its predecessor's unlawful discharges of sewage into Boston Harbor. *United States v. Metropolitan District Commission*, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20621 (D. Mass. 1981). The district court then entered detailed remedial orders requiring the construction of a new $6.1 billion sewage treatment system for the metropolitan Boston area and other portions of eastern Massachusetts. MWRA Pet. App. 3a. *See also United States v. Metropolitan District Commission*, 757 F. Supp. 121 (D. Mass.), *aff'd*, 930 F.2d 132 (1st Cir. 1991).

The district court imposed a strict schedule for the project, calling for new construction to begin by 1988 and to be completed by 1999. That court also ordered additional construction work to maintain and rehabilitate existing treatment facilities located on Deer Island in Boston Harbor pending completion of the new project. The district court's numerous detailed orders require that

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operations are controlled not by the Secretary of that Office but by the Authority's own independent board of directors, the majority of whom are chosen or nominated by the communities that use its services and pay its rates.

construction proceed without interruption, making no allowance for delays from such causes as labor disputes. *See* Joint Appendix in Court of Appeals ("C.A.J.A.") at 285-326.

3. *The Nature And Magnitude Of The Project*

The sewage treatment plant now under construction in Boston Harbor is the largest public works project in the history of New England and one of the largest wastewater treatment projects in the history of the nation. At the height of construction, as many as 22 prime contractors and 100 subcontractors will be working simultaneously. As many as 2,500 workers engaged in numerous construction trades will be on the site at that time.

In April 1988, MWRA selected Kaiser as its construction manager. The Authority charged Kaiser with managing and supervising construction activity, including overseeing labor relations on the jobsite. The smooth process of construction depends on an intricate schedule developed by Kaiser for the delivering and storing of materials, the sequencing of construction tasks and the transporting of workers and materials to the site of the construction. *See* C.A.J.A. 327-332.

All of this construction work will take place on a small, crowded site with limited means of access. Deer Island, the location of the new plant, has an area of only 215 acres and is located across a causeway at the end of a long, narrow peninsula extending into Boston Harbor. Because only a single two-lane road winding through residential neighborhoods connects Deer Island to the mainland, use of the site has been conditioned upon transporting half the workers and all construction materials to the site by water. *See* C.A.J.A. 276-281.

At this location, the Authority is building a new primary treatment plant, a new secondary treatment plant and facilities required to bring to these plants wastewater from an area with a population of 2.5 million and to transport from these plants treated effluent and sludge.

C.A.J.A. 274-75. The construction of these facilities will include the digging of a tunnel 26 feet in diameter under the harbor floor to carry treated wastewater 9.5 miles away into the deep waters of Massachusetts Bay and another tunnel to carry sewage 5 miles across Boston Harbor from Nutt Island to Deer Island. *See* MWRA Pet. App. 111a-112a.

In the summer of 1992 alone, contractors and workers on Deer Island have been engaging in such tasks as digging, through deep bedrock, the initial stage of the new 9.5 mile outfall tunnel; running New England's largest concrete batch plant; placing both the concrete produced by that plant and miles of piping into the new primary treatment plant; and continuing the transformation of a 110 foot high glacial drumlin in the center of the Island into a peripheral berm that will shield a neighboring residential community from the treatment plants. The level of construction will increase over the next year. In the midst of this beehive, the Authority and its employees continue to operate Boston's existing sewage treatment plants. *See* MWRA Monthly Compliance Reports, *United States v. Metropolitan District Commission*, No. 85-0489-MA (D. Mass.).

4. *The Nature of the Metropolitan Boston Labor and Contractor Markets*

Union members comprise a large portion of the construction labor force in the Boston area. Unionized contractors perform more than 75 percent of the commercial construction work in the area. More than 30 unions represent workers in the Boston area building and construction trades. *See* C.A.J.A. 328-330.

Because the usual term of the collective bargaining agreements covering those workers is substantially shorter than the projected ten-year life of the Boston Harbor Project, each of those agreements will be up for renegotiation numerous times during the term of the Project. Each renegotiation creates a potential for a strike or other form of lawful concerted action. Under the Na-

tional Labor Relations Act, as amended, 29 U.S.C. §§ 141 *et seq.*, a union engaged in a bargaining dispute may picket in support of its strike, and a strike and picketing by one union potentially could halt the work of a number of contractors.[2]

The nature of the local skilled construction labor force, of the established construction contractors, and of the construction site's geography then, make the Boston Harbor Project particularly vulnerable to delays caused by labor disputes. With only a single road and a single set of piers providing access to Deer Island, separate gates or entrances to the work sites for struck employers and for all other employers are not a practical means for averting delay. Indeed, in November 1988, when two local unions picketed to protest the use of a nonunion subcontractor, all construction activity on Deer Island came to a virtual standstill. MWRA Pet. App. 96a-97a; C.A.J.A. 277-79.

5. *The Boston Harbor Project Labor Agreement*

Because of the length of the Boston Harbor Project, the number and variety of contractors and craft workers required, and the project site's geography, MWRA was particularly concerned about the potential for labor disputes or disruptions that would impede its ability to meet the deadlines imposed by the federal court. The Authority therefore sought Kaiser's recommendations for a labor relations plan that would promote labor harmony over the ten-year life of the Project. Kaiser responded by recommending that the Project be governed by a master labor agreement negotiated prior to the start of the work and covering all contractors and subcontractors. C.A.J.A. 279-81 & 330.

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[2] Other workers may choose to respect the picket line. Even if the other workers initially choose not to discontinue work in support of a strike, they may soon find themselves unable to proceed further with the project because of work that has not been completed by the strikers. Unions engaging in organizational and area standards picketing of nonunion contractors, activities which the NLRA authorizes, present a similar potential for disruption.

In response to those recommendations, the Authority authorized Kaiser to attempt to negotiate such a "project labor agreement" with the BCTC and its national parent association, the Building and Construction Trades Department, AFL-CIO ("BCTD"). The Authority reserved the right to approve the final agreement. C.A.J.A. 281 & 330-331.

In May 1989, Kaiser, the BCTC, and the BCTD concluded negotiation of the Boston Harbor Project Labor Agreement (the "Project Agreement" or the "Agreement"). The Project Agreement reconciles portions of more than thirty separately-negotiated labor-management agreements and establishes the wages, benefits and working conditions for all the construction crafts on the Project for the full duration of the Project. The principal provisions of the Project Agreement include a 10-year no-strike commitment, an expedited procedure for resolving all labor-related disputes, use of union hiring halls to supply skilled union and nonunion craft workers to the Project, recognition of the BCTC as the exclusive bargaining agent of all craft employees on the Project, and a requirement that "the construction work covered by this Agreement be contracted to contractors who agree to execute and be bound by the terms of this Agreement." MRWA Pet. App. 109; *see also* C.A.J.A. 281-82 & 331-32; MWRA Pet. App. 107a-140a (text of Agreement).

In May 1989, the Authority's Board of Directors approved the Project Agreement and determined that the project work should be carried out according to the Agreement's terms. To give effect to this decision, the Authority incorporated Bid Specification 13.1 into its solicitation of bids for work on the Project. That specification contains the following provision:

> [E]ach successful bidder and any and all levels of subcontractors, as a condition of being awarded a contract or subcontract, will agree to abide by the provisions of the . . . Agreement . . ., and will be

> bound by the provisions of that agreement in the same manner as any other provision of the contract. [MWRA Pet. App. 141a-142a.] [3]

Neither the Project Agreement nor Specification 13.1 restricts the bidding to "union" contractors. Rather, the agreement specifies that any qualified bidder is free to compete for a contract, without regard to whether the bidder has any preexisting bargaining relationship with a union, and without regard to the bidder's willingness to sign any other agreement with a union. MWRA Pet. App. 110a, 112a-113a.

Similarly, as this Court has explained, "nonunion employees are not frozen out of the job market by . . . agreements" such as this one. *Woelke & Romero Framing Co. v. NLRB*, 456 U.S. 645, 664 (1982). "Even where construction unions successfully negotiate collective-bargaining agreements that require . . . contractors and subcontractors to obtain their labor from union hiring halls, the union must refer both members and nonmembers to available jobs." *Id.* at 664-65 & n. 18 (*citing* 29 U.S.C. §§ 158(a)(3), 158(b)(2); *Radio Officers v. NLRB*, 347 U.S. 17, 40-42 (1954); *Teamsters v. NLRB*, 365 U.S. 667, 673-677 (1961)).[4]

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[3] Massachusetts competitive bidding laws require the Authority to state its preference for a project labor agreement, like any other contract term, in the form of a bid specification. These laws, which the Authority's Enabling Act explicitly incorporates, require that the competitive bidding process must be carried out by the awarding authority. Mass. Gen. L. c. 30, § 39M; c. 92 App., §§ 1-8(g); c. 149, §§ 44A-44H; *Modern Continental Construction Co. v. Lowell*, 391 Mass. 829, 836, 465 N.E.2d 1173 (1984). These laws also require detailed bid specifications describing the work to be done. Mass. Gen. L. c. 30, § 39M(b); c. 149, § 44B(1); *Datatrol, Inc. v. State Purchasing Agent*, 379 Mass. 679, 400 N.E.2d 1218 (1980).

[4] As an added safeguard to employees, federal law provides that the union security provisions of the agreement may only require

B. The Legal Background

The Project Agreement is an example of a type of contractual arrangement which grew out of longstanding practices in the construction industry that differ in fundamental respects from those in other industries. In recognition of those differences, Congress has crafted special construction industry labor relations rules.

1. *Labor Relations Factors in the Construction Industry.*

Employment in the construction industry tends to be for shorter terms than in most other industries. Many craft workers work for a particular employer only for the duration of a single project or only for the duration of a particular stage of a project. And many of those workers maintain longer-term relations with their unions —which have traditionally operated job referral systems —than with any particular employer.

As a result, "representation elections in a large segment of the industry are not feasible [means for] demonstrat[ing] majority status due to the short periods of actual employment by specific employers." S. Rep. No. 187, 86th Cong. 1st Sess. 55-56 (1959), *reprinted in* 1 NLRB, *Legislative History of the Labor Management Reporting and Disclosure Act of 1959*, at 451-52 ("Leg. Hist."). *See NLRB v. Local 103, Ironworkers*, 434 U.S. 335, 348-49 (1978).

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employees to undertake certain financial obligations of membership, and may not require membership itself. *See Communications Workers v. Beck*, 487 U.S. 735 (1988); *NLRB v. General Motors*, 373 U.S. 734 (1963).

Moreover, NLRA § 8(f), 29 U.S.C. § 158(f), expressly provides that employees working under a prehire contract may, notwithstanding the agreement, petition the NLRB at any time for an election to decertify their bargaining representative or deauthorize that representative from negotiating or enforcing any union security requirements.

From the employer perspective, delaying the establishment of collective bargaining relationships until after a formal demonstration of majority support (if one can be had) is a matter of serious moment because most work is allocated through the letting of bids. That being so, prehire collective bargaining is often needed so that "labor costs [can be determined] before making the estimate upon which [a contractor's] bid will be based." H.R. Rep. No. 741, 86th Cong., 1st Sess. 19 (1959), *reprinted in* 1 Leg. Hist. 777. In addition, employers often need to deal with the relevant union referral services prior to hiring in order to be able to obtain "a supply of skilled craftsmen ready for quick referral." *Id.*

A second difference between construction and most other industries is that construction sites involve complex contracting and subcontracting arrangements that result in employees of different employers working closely together in interdependent relationships. These arrangements create a "close community of interest" between "the employees of various subcontractors" on a site, as "the wages and working conditions of one set of employees may affect others." *Woelke & Romero*, 456 U.S. at 661-662. These jobsite conditions also particularly present "the possibility of jobsite friction" as union-represented workers and nonunion workers interact. *Id.* at 661.

To address these special industry characteristics, beginning long before enactment of the NLRA, construction unions and employers made a practice of entering into prehire agreements.[5] These collective bargaining

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[5] *Hearings before the Subcommittee on Labor and Labor-Management Relations of the Sen. Comm. on Labor and Public Welfare: on S. 1973, a Bill To Amend the National Labor Relations Act, as amended with reference to the Building and Construction Industry and for Other Purposes*, 82d Cong., 1st Sess. 48 (1951) (the "*Hearings*") (Testimony of William E. Maloney, Vice Pres., Building and Construction Trades Dep't, Pres., Operating Engineers, A.F. of L.).

agreements—which establish wage rates and other terms of employment before employees are hired for particular projects—enable contractors to determine labor costs prior to bidding on work and assure that sufficient skilled labor will be available. Unions and employers also commonly entered into "broad subcontracting agreements," which limit the employers who could perform work on a construtcion site, for example, to union signatory employers or to employers who will adhere to a master labor agreement. *See Woelke & Romero*, 456 U.S. at 659.

2. *The Construction Industry Amendments to the NLRA*

As passed in 1935, the NLRA made no provision for prehire agreements. But for a decade this had no effect on established practices because the National Labor Relations Board (the "NLRB") did not exercise jurisdiction over the construction industry. *See* S. Rep. No. 1509, 82d Cong., 2d Sess. 4 (1952) (citing *In re Brown & Root, Inc.*, 51 NLRB 820 (1943)); S. Rep. No. 187, *supra*, at 27-29, *reprinted in* 1 Leg. Hist. 423-25.

After the 1947 Taft-Hartley amendments, however, the Board did assert jurisdiction over the industry. *See Ozark Dam Constructors*, 77 NLRB 1136 (1948); *Watson's Specialty Store*, 80 NLRB 533 (1948). As a consequence, the NLRB invalidated the union recognition clauses of construction industry prehire agreements on the theory that the unions had not demonstrated majority support in an appropriate bargaining unit before obtaining recognition. *See* S. Rep. No. 1509, *supra*, at 4-5.

The ensuing dislocation in construction industry collective bargaining led both unions and employers in the industry to seek legislation validating traditional collective bargaining patterns. Between 1951 and 1958, such legislation was repeatedly introduced and was the subject

of extensive hearings, although no legislation was enacted.[6]

Finally, in 1959, Congress enacted provisions amending the NLRA to permit continuation of customary labor relations practices in the construction industry. Section 8(f) authorizes construction industry employers to enter into prehire agreements, under which the employer recognizes unions as the representatives of work forces the

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[6] In 1951 Senator Taft introduced S. 1973, 82nd Cong., 2d Sess., which was the subject of detailed hearings. *See* 97 Cong. Rec. 9675 (1951); *Hearings, supra.* The bill was unanimously reported by the Senate Labor Committee, and was passed by the Senate by voice vote, without debate. *See* S. Rep. No. 1509, *supra*; 98 Cong. Rec. 5028-29 (1952). However, before action by the House of Representatives, the Eighty-Second Congress adjourned.

Senator Taft introduced a bill to the same effect, S. 656, 83rd Cong., 1st Sess., in 1953, and Senator Smith, Chairman of the Senate Labor Committee, introduced a similar bill in 1954, S. 2650, 83rd Cong., 2d Sess., embodying a proposal of the Eisenhower Administration. *See generally Hearings before the Senate Committee on Labor and Public Welfare on Proposed Revisions of the Labor-Management Relations Act of 1947*, 83rd Cong., 2d Sess. (1954). Although the Smith bill was favorably reported by the Senate Labor Committee, *see* S. Rep. No. 1211, 83rd Cong. 2d Sess. (1954), it died on the Senate floor as a result of efforts to offer amendments relating to other NLRA issues. *See* 100 Cong. Rec. 5827, 6193 (1954).

Efforts in 1958 to amend the NLRA more comprehensively included proposals to validate prehire contracting in the construction industry. *See, e.g.*, S. 3098, S. 3738, 85th Cong., 2d Sess. (1958). Extensive hearings were again held. *See Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare on Union Financial and Administrative Practices and Procedures*, 85th Cong., 2d Sess. (1958). And the Senate Labor Committee reported out a bill, S. 3974, which, with respect to prehire contracting, followed the approaches of the 1951 Taft bill and the 1954 Smith bill. 104 Cong. Rec. 11472 (Sen. Kennedy) (1958). Although it passed the Senate by a vote of 88-1, *id.* at 11486-87, the bill died in the House.

employer has not yet hired and agrees to use union operated referral systems for hiring. 29 U.S.C. § 158(f).[7]

At the same time, Congress was considering proposals to prohibit "hot cargo agreements," in which an employer agrees with a union to cease doing business with third parties. Applied to the construction industry, those proposals would have called into question the validity of the traditional industry "contracting and subcontracting" clauses. That being so, when Congress enacted § 8(e), a proviso was appended to exclude from its prohibition "an[y] agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction . . . ." 29 U.S.C. § 158(e).

3. *NLRA §§ 8(e) & 8(f) and Project Labor Agreements*

Taken together, NLRA §§ 8(e) and 8(f) safeguard the validity of project labor agreements which require all contractors and subcontractors who work on a project to agree in advance to abide by a master collective bargaining agreement for all work done on the project. *See Jim McNeff v. Todd*, 461 U.S. 260, 270 & n.9 (1983); *Woelke & Romero*, 456 U.S. at 659-660, 663.

These project agreements incorporate prehire and subcontracting provisions in a manner adapted to large, lengthy, and complex projects. A leading treatise describes this kind of arrangement as follows:

> *Project agreements*: For large projects involving a considerable volume of construction at a single site (or interrelated group of sites) over a period of years, a special agreement will sometimes be nego-

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[7] NLRA § 8(f) "is substantially the same as [the] bill introduced in 1951 by Senator Taft." 2 Leg. Hist. 1070 (statement of Sen. Kennedy, the principal sponsor of the bill). And its purpose is "to accommodate the special circumstances of the construction industry." *NLRB v. Local 103, Ironworkers*, 434 U.S. at 349.

> tiated. It may involve the owner of the project as well as his contractors, or it may be sought by the contractor at the owner's insistence. These agreements normally attempt to guarantee the progress of the work without interruption by strikes and to establish special mechanisms for dispute settlement; sometimes they provide means for determining wages and conditions at the projects. While project agreements may be negotiated independently at the national level, at other times they are negotiated with the full cooperation of local parties. [D. Q. Mills, *Industrial Relations and Manpower in Construction* 40 (1972).]

The United States Department of Labor has explained how the economic concerns of owners and contractors on large projects prompted the development of project labor agreements:

> [T]he project agreement developed as a response to problems peculiar to the construction industry. The typical local agreement seldom meets the needs of massive projects such as the construction of the St. Lawrence Seaway or the Alaska Pipe Line, which last for several years, pose special problems of manning and work rules, and involve huge sums of money, a consortium of several contractors, and a great deal of public interest and often public funds. Contractors on such projects, and their eventual owners, want continuity of production, more favorable treatment of costs such as travel and overtime pay than local agreements typically provide, uniform shift and other conditions for all trades and the help of national union officials experienced in securing manpower and administering agreements on large projects . . . . For contractors and owners, one of the chief attractions of such agreements has been their recent inclusion of a clause promising no strikes for the duration of the project. [U.S. Department of Labor, Labor Management Services Administration, *The Bargaining Structure in Construction: Problems and Prospects*, at 14 (1980) ("*Labor Department Study*").]

Recently, the NLRB General Counsel described and upheld against an NLRA challenge a private-sector project labor agreement negotiated by a project manager, at the insistence of a private project owner. *See Morrison-Knudsen*, 13 Advice Mem. Rep. ¶ 23,061 (NLRB-GC 1986) (reprinted as Appendix F of the Appendix to the *certiorari* petition in No. 91-261 ("BCTC Pet. App."), at 97a-102a).[8]

C. The Prior Proceedings

In March 1990, a contractors' association, other than the respondent association, filed a charge with the NLRB contending that the Project Labor Agreement violates the NLRA. The NLRB General Counsel refused to issue a complaint, finding the Agreement lawful under NLRA § 8(e)'s construction industry proviso and under § 8(f). *See Building & Trades Council*, NLRB Case No. 1-CE-71 (NLRB-GC June 25, 1990) (NLRB Division of Advice Memorandum on the Project Agreement) (reprinted as Appendix D at BCTC Pet. App. 83a-88a).[9]

Also in March 1990, the Associated Builders and Contractors of Massachusetts/Rhode Island (an association of contractors who normally perform work on a nonunion basis), as well as 6 of its affiliates (collectively "ABC" or

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[8] In *Morrison-Knudsen*, Saturn Corporation had hired Morrison-Knudsen to serve as project manager for the construction of an automobile plant. At Saturn's behest, the project manager entered into a project labor agreement with BCTD and a number of national and local construction unions. The agreement reserved to Saturn the right to select all contractors, and required that all subsequently selected contractors use union-referred and union-represented employees and abide by all other aspects of the agreement with respect to employment terms. BCTC Pet. App. 97a-102a.

[9] The court below agreed. *See* MWRA Pet. App. 24a ("It is apparent . . . that under the exceptions established by Sections 8(e) and (f) of the Act, the Master Labor Agreement between the Trades Council and Kaiser is a valid labor contract.") (Citing *Jim McNeff*, 461 U.S. at 265-66).

the "ABC contractors"), brought this suit in the United States District Court for the District of Massachusetts, seeking to enjoin Specification 13.1 and challenging the lawfulness of the bid specification and the Project Agreement on a variety of grounds including NLRA preemption. On April 11, 1990, the district court issued a memorandum and order which rejected each of the ABC contractors' various theories, including NLRA preemption, and denied the injunction. *See* MWRA Pet. App. 72a-83a.

In denying the injunction, the district court found that MWRA "was concerned that because of the scale of the project and the number of different craft skills involved, the project was vulnerable to numerous delays, thus placing the court-ordered schedule in jeopardy and subjecting it to the contempt orders of [the] Court." MWRA Pet. App. 74a. That court further found as follows:

> The purpose [of the Project Agreement] was to achieve jobsite labor harmony in order to maintain the court-ordered schedule and avoid the risk of substantial fines for non-compliance. In the absence of such an agreement, legitimate labor disagreements and demonstrations would lead to delays in construction, resulting in increased costs to the MWRA. [*Id.* at 75a-76a.]

A panel of the United States Court of Appeals for the First Circuit (Torruella, Campbell and Re) reversed the decision of the district court and directed entry of a preliminary injunction restraining the use of Specification 13.1. The panel only reached the claim that the Authority's bid specification is preempted by the NLRA, deciding this issue in favor of the ABC. MWRA Pet. App. 49a-71a.

After the district court entered the prescribed injunction on remand, the court of appeals granted rehearing *en banc* on the petition of the BCTC. MWRA Pet. App. 84a-85a, 86a. The *en banc* court, divided 3-2, again found

the bid specification preempted by the NLRA and remanded the action to the district court. *See* MWRA Pet. App. 1a-48a. The majority opinion below held preempted the Authority's requirement that its contractors agree to the Project Agreement, as a "*direct*" state "interference into the collective bargaining process." MWRA Pet. App. 30a. (emphasis in original). The majority based that holding on the premise that "Congress occupied the field" in passing the NLRA, prohibiting virtually all state involvement in private sector labor relations. MWRA Pet. App. 24a; *see also* MWRA Pet. App. 10a-11a and 14a n.13.

In dissent, Chief Judge Breyer—now joined by Circuit Judge Campbell—argued that the NLRA presents no impediment to the Authority's bid specification. Specifically, the dissent concluded that the NLRA does not preempt the state from seeking to serve its "economic self-interest as a purchaser" of construction services in the same manner that the NLRA permits similarly situated private purchasers of such services. MWRA Pet. App. 45a. The dissent went on to explain:

> The NLRA does not contain any language that *explicitly* forbids a state, acting like a general construction contractor, from entering into a prehire agreement. Rather, the majority believes that the Act *implicitly* forbids it from doing so, *i.e.*, that the Act implicitly removed, or preempted, a state's power to act as the MWRA has acted here . . . . We do not see how permitting a state agency, when acting like a general contractor, to make labor agreements just like those that private general contractors make, could "conflict with" the NLRA, "frustrate" the NLRA "scheme", or otherwise interfere with the regulatory system that the NLRA creates. [MWRA Pet. App. 32a (emphasis in original).]

The BCTC and the Authority filed Petitions for *Certiorari* on August 12 and 13, 1991. On May 18, 1992, this Court granted the petitions and consolidated the cases for argument.

SUMMARY OF ARGUMENT

The decision of the court of appeals is startling in its illogic.

In response to economic forces particular to the industry, construction employers and workers, encouraged by project owners—public and private alike—have developed a unique pattern of labor relations. The industry practices have traditionally included collective bargaining agreements covering employees who had not yet been hired and binding employers to whom work had not yet been contracted. In 1959, Congress amended the NLRA to safeguard those practices and, thus, to give continued free rein to the economic forces that had shaped them.

MWRA, as owner and developer of metropolitan Boston's new sewage treatment facilities, determined to have its facilities constructed according to a labor relations arrangement that Congress expressly made lawful in the 1959 amendments. Its decision, identical to the decisions that public and private owners of construction projects have been making for decades, is an example of the very economic forces Congress intended to leave unrestricted. *See* pp. 24-26, *infra*.

Yet, perversely, the court of appeals found the Authority's decision preempted as an interference with Congress' intended play of economic forces.

In reaching a result that—in the name of congressional intent—so manifestly frustrates the intent of Congress, the court of appeals veered from error to mistake. At the outset, the court below failed to heed this Court's repeated counsel that preemption is not to be lightly inferred. Rather, the majority apparently proceeded on the mistaken assumption that congressional action is presumed to oust state authority. Without benefit of any statement by Congress that it intended to reach this result, the court of appeals adopted a *per se* rule that—even when states act in a purely proprietary capacity for purely proprietary

reasons in the same manner as a private proprietor—the states are foreclosed from action that directly affects collective bargaining by others. MWRA Pet. App. 30a.

Neither the structure, the words, nor the history of the NLRA provide any express or implied basis for the conclusion that Congress intended to enact the rule the court of appeals imposed. The Act does not specify the extent of its intended preemptive effect. Rather, a congressional intent to preempt must be implied from the overall structure and particular substantive provisions of the Act. The indication from those sources is that Congress did not intend to restrict the states as would the court of appeals. *See* pp. 24-33, *infra*.

Read as a whole, with particular attention to those of its provisions that distinguish the states from private parties, the NLRA embodies an intent that, when the states act as persons engaged in proprietary conduct for proprietary reasons, they should have, if anything, more freedom than private parties in matters affecting labor relations, not less. *See* pp. 26-30, *infra*.

Not surprisingly, this Court's prior decisions do not support the court of appeals' decision. The court below misread those decisions, just as it misconstrued the Act. That court failed to appreciate the importance of the fact that the precedents it cited arose in regulatory rather than truly proprietary contexts. And it is manifest that the rationale for those decisions applies only in their regulatory context. *See* pp. 33-36, *infra*.

In the end, the effect of the court of appeals' decision is as ironic as it is perverse. The law of the United States, a federal court decided, requires the Authority to take extraordinary steps to carry out, without delay, a massive cleanup of Boston Harbor, on pain of large fines. To obey the law, to avert added costs and delays, and to avoid the fines, the Authority made a purchasing decision that provides for a labor relations arrangement that is common on private construction sites and that Congress

amended the NLRA to permit. Now, unless the judgment below is reversed, the choice to proceed in that way is forbidden to the Authority.

ARGUMENT

MWRA'S BID SPECIFICATION IS LAWFUL UNDER THE NATIONAL LABOR RELATIONS ACT AND IS CONSISTENT WITH THE NATIONAL LABOR POLICY

MWRA's determination that a project labor agreement would govern labor relations on its massive Boston Harbor Project—embodied in its Bid Specification 13.1—violates no law of the United States. On the contrary, agreements like the Project Agreement are standard in the construction industry, and are explicitly provided for in the National Labor Relations Act. Indeed, the considerations that led the Authority to conclude that a project labor agreement should govern on the Boston Harbor Project were the very considerations that led Congress to safeguard such agreements through NLRA § 8(f) and the proviso to § 8(e).

The court below concluded that the NLRA forecloses public owner-developers from availing themselves, if they choose, of the very means of effectuating their proprietary interests that Congress has safeguarded for private owner-developers. That conclusion is based on a mistaken understanding of preemption principles generally, and of this Court's precedents regarding labor law preemption in particular.

A. General Principles of Preemption Analysis

The intent of Congress is the "ultimate touchstone" in any preemption analysis. *Cipollone v. Liggett Group, Inc.*, —— U.S. ——, 60 L.W. 4703, 4706 (June 24, 1992). Moreover, since the NLRA contains no express preemption provision, familiar principles of preemption law provide that the Authority's bid specification should not be found to be preempted "unless it conflicts with federal law or

would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747-48 (1985).

This Court's longstanding reluctance to infer that federal law preempts state authority, *see Cippolone*, 60 L.W. at 4706; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), is based, in part, on constitutional principle and, in part on empirical reality. Because federal preemption involves a restriction of state power, "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Moreover, as this Court has recently observed, Congress commonly manifests respect for state authority by exercising its Commerce Clause powers in a way that exempts state proprietary action from general comemrcial regulation or that grants the states added compliance leeway. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 553-54 & n.17 (1985) (listing examples, including the NLRA).[10]

Those considerations are of particular significance in this case, where the court below significantly expanded the scope of labor law preemption. While this Court has previously established that Congress intended the NLRA to preempt state *regulation* of private industry in a number of different respects, the Court has never found in the NLRA an intent to impose a limitation on a state's management of its own property when the state pursues its purely proprietary interests, and where analogous private conduct would be permitted. *Cf. Reeves, Inc. v. Stake*, 447 U.S. 429, 439 (1980) ("[S]tate proprietary activities

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[10] Indeed, inclusion of the states within the coverage of such legislation often comes only after heated congressional debate. *See* Subcommittee on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972*, pp. 1102-75.

may be, and often are, burdened with the same restrictions imposed on private market participants. Evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints.").

B. MWRA's Bid Specification Is Not Preempted By The NLRA

1. *General Principles Of Labor Law Preemption*

This "Court has articulated two distinct NLRA preemption principles"—the "*Garmon* preemption principle" [11] and the "*Machinists* preemption principle" [12]—each corresponding to a different set of federal policy concerns embodied in the NLRA with which state actions might conflict. *Metropolitan Life Ins. Co.*, 471 U.S. at 748.

The first of those principles—*Garmon* preemption—bans state actions to the extent those actions conflict with either the regulatory judgments embodied in NLRA §§ 7 and 8 or the related jurisdictional judgments made by Congress in "creating an administrative agency [the NLRB] in charge of creating detailed rules to implement the Act, rather than having the Act enforced and interpreted by the state or federal courts." *Metropolitan Life Ins. Co.*, 471 U.S. at 748 & n.26.

The ABC contractors have put their emphasis on the second NLRA preemption principle: *Machinists* preemption. It is *Machinists* preemption—the ABC contractors contend and the court of appeals concluded—that invalidates the MWRA's procurement decision.[13]

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[11] *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

[12] *See Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976).

[13] Although the ABC contractors have relied all but exclusively on the *Machinists* doctrine in arguing that MWRA's actions are preempted by the NLRA, the majority below did, at various points, state that the Authority's actions "implicat[e]" the *Garmon* pre-

This Court has explained that the *Machinists*' ruling is designed "to govern pre-emption questions that ar[i]se concerning activity that [is] neither arguably protected . . . nor arguably prohibited" by the NLRA's specific terms. *Metropolitan Life Ins. Co.*, 471 U.S. at 749. *Machinists* rests on the understanding that Congress intended certain labor relations activities, which the Act neither protects nor prohibits in specific terms, "to be unregulated," so that such activities would "be controlled [only] by the free play of economic forces." *Machinists*, 427 U.S. at 140. A *Machinists* case, in other words, turns on whether a challenged state action constitutes an unenvisioned state interference with Congress' intended "free play of economic forces."

In contrast to most preemption analyses, *Machinists* analysis requires the courts to infer Congress' intent without guidance from specific statutory prohibitions or protections regarding the precise conduct at issue. The courts must therefore "determine [Congress' intended] impact on state law [from] the wider contours of federal labor policy," drawing "implicat[ions from] the structure of the Act itself." *Metropolitan Life Ins. Co.*, 471 U.S. at 749, 753.

In examining these "contours of federal labor policy" this Court has identified two fundamental underpinnings of *Machinists* analysis. *First*, Congress did *not* intend in the NLRA to create a regime in which labor relations in the private sector are wholly insulated from all state actions and policies. *See Metropolitan Life Ins. Co.*, 471 U.S. at 757. *Second*, the Court has emphasized that "[a]n appreciation of the State's interest" in the dis-

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emption principle as well. MWRA Pet. App. 15a, 21a. But, since the opinion does not explain how *Garmon* preemption is "implicated" here, and since, so far as can be discerned, *Garmon* preemption is not implicated here, the discussion in text is confined to the ABC contractor's *Machinists* claim. *See also Brief of the United States as Amicus Curiae in Support of the Petitions for Certiorari* in Nos. 91-261 & 91-274, at 8 & n.6 (filing in the instant cases).

puted state action may be highly relevant in evaluating whether Congress would have considered such an action to be an unenvisioned interference with the "free play of economic forces" that Congress contemplated. *Id.* at 749-50 n.27. Put another way, the "scope, purport and impact of the state [action] may *not* be ignored." *New York Tel. Co. v. New York Dept. of Labor*, 440 U.S. 519, 532 n.21 (1979) (Stevens, J.) (emphasis added).[14]

Against this background, the question here is whether a state agency's decision to provide for a project labor agreement in the development of its own property is an impermissible interference with the "free play of economic forces" that Congress intended to govern construction industry labor relations.

2. *Application of the* Machinists *Preemption Principle to the Project Agreement*

The holding below rests on a fundamental misunderstanding of *Machinists* preemption. The court of appeals majority failed to grasp that MWRA's purchasing decision—far from being an interference with Congress' intended free play of construction industry economic forces—is a choice by a purchaser of construction services to take advantage of an option that Congress intentionally made available to such purchasers. Chief Judge Breyer, dissenting below, went to the heart of the matter when he stated:

> [W]hen the MWRA, acting in the role of purchaser of construction services, acts just like a private contractor would act, and conditions its purchasing upon

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[14] Starting from these propositions, this Court has upheld against *Machinists* challenges a wide variety of state actions that concern labor matters, despite the substantial impacts of these state actions on the labor relations conduct of unions and employers operating under the NLRA. *See e.g., Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 19-22 (1987); *Baker v. General Motors Corp.*, 478 U.S. 621, 634-38 (1986); *Metropolitan Life Ins. Co., supra; Belknap v. Hale*, 463 U.S. 491, 498-507 (1983); *New York Tel. Co. v. New York Dept. of Labor, supra.*

> the very sort of labor agreement that Congress explicitly authorized and expected frequently to find, it does not 'regulate' the workings of the market forces that Congress expected to find; it exemplifies them. [MWRA Pet. App. 35a.]

In enacting NLRA §§ 8(e) and 8(f), Congress did not impose any particular labor relations arrangements on the construction industry. Rather, Congress expressly expanded the options available to industry participants to advance their economic interests, as they assess those interests. By denying one option to public owner-developers that is available to private owner-developers, the decision below places a restriction on Congress' intended free play of economic forces.

a. *The Project Agreement and the Relevant Economic Forces*

MWRA and the BCTC each balanced costs and benefits to reach an outcome both consider economically beneficial. The Authority concluded that the long-term stability and predictability that the Project Agreement promised would more than offset any potential economic losses attributable to the Agreement. For its part, the Council concluded that the benefits of the Agreement justified forgoing, for the full term of the Project, the rights to strike and picket granted by the Act. There is no ground to distinguish the economic forces that operated here from those that operate elsewhere in the construction industry.

First, the Project Agreement serves important economic interests of the Authority recognized by Congress as fully legitimate. Specifically, the Agreement provides the Authority with legally enforceable assurances of long-term labor stability on a projectwide basis. *See* pp. 5-8, *supra*. This Court has acknowledged that such arrangements, by "prohibit[ing] the subcontracting of jobsite work to nonunion firms," serve the "legitimate purpose" of reducing

the possibility of labor strife. *Woelke & Romero Framing Co. v. NLRB*, 456 U.S. 645, 662 & n.14 (1982).

Second, the scope and effects of these arrangements are narrowly tailored to confine their impact to the Boston Harbor Project. Thus, the Project Agreement *only* governs construction work performed on this Project. And the Agreement specifies that *all* contractors shall remain eligible to compete for project work, regardless of their labor practices elsewhere, as long as the contractor agrees to conform to the Agreement's practices *while performing work on this Project*. *See* p. 8, *supra*.

Third, the Authority's decision in favor of the Project Agreement imposes no pressures whatsoever on any contractor, subcontractor, or employee, other than the pressures commonly imposed on such parties when engaged on private projects that are governed by analogous, clearly lawful, arrangements. In discussing the very constraints that project labor arrangements impose on construction industry contractors and subcontractors—indeed, the very constraints that the ABC contractors complain of in this case—this Court has made clear that such "pressures" are "implicit in the construction industry proviso" of NLRA § 8(e) and thus consistent with Congress' intended plan. *Jim McNeff v. Todd*, 461 U.S. 260, 270 n.9 (1983). *See also Woelke & Romero*, 456 U.S. at 663 & n.11.

b. *The Statutory Text And the Court Below's Reading Of That Text.*

The court of appeals deemed all of these factors "irrelevant to the preemption issue at hand" because of a unique and mistaken construction of the term "employer" as used in the Act. MWRA Pet. App. 24a. Specifically, the court below pointed out that both NLRA §§ 8(e) and 8(f) use the term "employer" in delineating the class of contracts preserved by those sections from the Act's otherwise applicable prohibitions. *See* 29 U.S.C. § 158(e) (re-

ferring to agreements "between a labor organization and an employer in the construction industry"); 29 U.S.C. § 158(f) (referring to agreements entered into by "an employer engaged primarily in the building and construction industry"). The term "employer" is, moreover, defined in NLRA § 2(2) to exclude *inter alia* "any State or political subdivision thereof." 29 U.S.C. § 152(2). And, from this, the majority below inferred that Congress intended to deny to the states alone, when developing their own property, the construction industry arrangements referred to in §§ 8(e) and 8(f). MWRA Pet. App. 20a-21a, 24a-25a.

The inference the court of appeals drew from the statutory language of a congressional desire to *decrease* the options available to public owners and developers of property—while leaving a broader range of options available to private owners and developers—is unwarranted. The NLRA, fairly read, points in exactly the opposite direction.

First, the Act *nowhere* expressly prohibits a state or local government from engaging in any particular transaction. Rather, *all* of the NLRA's express prohibitions are directed at an "employer" or a "labor organization." *See* NLRA §§ 8(a) & 8(b). That fact strongly suggests that state proprietary actions—such as the Authority's here—do not run afoul of the Act. And the limited nature of the Act's prohibitions fully explains why Congress used the term "employer" in §§ 8(e) and 8(f). As Chief Judge Breyer explained:

> [T]he obvious reason is that the list of forbidden practices, to which the exceptions [in NLRA §§ 8(e) and 8(f)] apply, itself applies only to an "employer," defined to exclude "any State" . . . . A drafter, writing a statutory exception to the resulting prohibition[s], would not normally extend its scope beyond those subject to the prohibition[s], in the first place. [MWRA Pet. App. 41a.]

There was, then, no reason for Congress to exempt the states from a rule to which the states were not subject in the first place.

Second, in focusing on the fact that the MWRA is not an "employer," the court of appeals ignored the fact that the Authority is not purporting to act as one; nor does the legal validity of its actions depend on the Authority being an "employer." The Project Agreement is a collective bargaining agreement between Kaiser—undeniably an "employer" for purposes of § 8(f) and the construction industry proviso of § 8(e)—and the BCTC. Accordingly, the NLRB General Counsel found the Agreement to be valid under those provisions. *See Building & Trades Council*, NLRB Case No. 1-CE-71 (June 25, 1990) (reprinted at BCTC Pet. App. 83a).

The Authority in its turn is acting in its proprietary capacity *as a property owner purchasing construction services in order to develop its property.* Its role is no different from that often—and lawfully—played by private owners of construction projects who choose to have the construction services they purchase performed under a project labor agreement in order to further their economic interests. *See e.g., Morrison-Knudsen Co., Inc.*, 13 NLRB Advice Mem. Rep. ¶ 23,061 (March 27, 1986) (noting owner's insistence on a project labor agreement) (reprinted at BCTC Pet. App. 97a); D.Q. Mills, *Industrial Relations and Manpower in Construction, supra*, at 40 (project labor agreements "may involve the owner of the project as well as his contractors, or . . . may be sought by the [general] contractor at the owner's insistence"); *Labor Department Study, supra*, at 14 (project labor agreements developed out of needs of "contractors and owners"). *See generally*, pp. 13-15, *supra.*

The court of appeals apparently assumed that entities which are not "employers" within NLRA § 2(2) may

not utilize project labor agreements that have been negotiated pursuant to NLRA §§ 8(e) and (f), *even when acting as owners of property, rather than as employers.* That assumption leads to absurd results. For example, railroads and airlines are *not* "employers" under NLRA § 2(2), because that provision excludes from the "employer" definition "any person subject to the Railway Labor Act." 29 U.S.C. § 152(2). Yet no one could seriously contend that any source of law prohibits such businesses, when developing their own property through construction industry employers and employees, from insisting that their construction managers and contractors negotiate and adhere to lawful project labor agreements.

Third, the court of appeals was especially unwarranted in using NLRA § 2(2) as the basis for finding a congressional intent to limit the options available to the states. As this Court has recognized, the "employer" definition in § 2(2) constitutes a congressional judgment to provide an "exemption[] for States and their subdivisions" from "obligations imposed by Congress under the Commerce Clause." *Garcia*, 469 U.S. at 553 & n.16. Neither the court of appeals nor the ABC contractors have cited any authority supporting the notion that Congress intended that this express exemption of the states from obligations under the Act should *decrease* the states' freedom of action.

Fourth, the inference from § 2(2) drawn by the court below ignores the basic legal principle that, in the absence of any express indication of a congressional intent to preempt state actions, an inference of such intent is disfavored. *See* p. 21, *supra*. This principle normally operates to prevent the extension of a prohibition on private proprietary conduct to analogous public proprietary conduct. Yet here, the court below rushed headlong in the opposite direction, inferring an intent to *prohibit* public proprietary conduct from a provision that *lifts a prohibition* on analogous private conduct. Such a perverse

inference stands our basic concept of federalism on its head. *See* pp. 21-22, *supra*.

c. *The Relevant Legislative History*

The legislative history of NLRA §§ 8(e) and 8(f) provides no support for the premise that Congress intended public proprietors to be denied options available to their private counterparts. Instead, the legislative materials that discuss publicly-owned construction projects assume that the labor relations arrangements on such projects would be no different than the arrangements prevailing on privately-owned projects.

As this Court has stated, the 1959 Congress, in enacting §§ 8(e) and 8(f), was seeking "to preserve the *status quo* regarding agreements between unions and contractors in the construction industry." *Woelke & Romero*, 456 U.S. at 657; *see also id.* at 654-660 (reviewing legislative history). The proposed prohibition on "hot cargo agreements" that would become § 8(e) and the NLRB's prior invalidation of prehire agreements called the preexisting "pattern of collective bargaining in the construction industry" into question. *See* pp. 11-13, *supra*. Congress responded by enacting special construction industry rules "to ensure that [this preexisting pattern] remained lawful." 456 U.S. at 657. The collective bargaining arrangements Congress intended to preserve as options in the construction industry are therefore to be determined "by examining Congress' perceptions regarding the status quo in the construction industry" when it enacted these provisions. *Id.*

This Court has discovered those "perceptions" by looking at knowledgeable witnesses' descriptions of labor relations in the construction industry in the extensive congressional hearings preceding the enactment of §§ 8(e) and 8(f), as well as at secondary materials describing practices in the industry at the time. 456 U.S. at 657-660. An examination of those materials confirms that

Congress proceeded on the understanding that labor relations practices on construction projects did not differ depending on whether the project owner was a private entity or a public entity.

In the hearings, witnesses repeatedly described to Congress the collective bargaining arrangements they wished to preserve by giving examples from private and public projects interchangeably. Indeed, some witnesses went further, and stressed the costs of disrupting these prevailing patterns *on public projects*—where the public interest was most clearly implicated—in order to make their case for the proposed legislation.[15]

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[15] *See, e.g., Hearings on S. 1973 Before the Subcomm. on Labor and Labor-Management Relations of the Senate Comm. on Labor and Public Welfare*, 82nd Cong., 1st Sess. 31 (1951) (testimony of R. Gray, President of the BCTD) (arguing that if current collective bargaining patterns were disrupted, "[o]n a public building . . . the taxpayer would pay excessive costs" and the public injury "would be especially serious now, when the building and construction industry is engaged in vital emergency defense projects"); *id.* at 133 (testimony of R. Cole, Tile Contractors Ass'n. of America) (stressing need for prehire collective bargaining in hypothetical "$5,000,000 project out in the desert some place either for private industry or for the Government"); *id.* at 168 (testimony of G. Johnson, spokesman for the Guy F. Atkinson Co. and the Associated General Contractors of Calif.) (stressing that many projects "such as dams, powerhouses, tunnels, and the like . . . involve millions of dollars—usually of taxpayers' funds"); *id.* at 169 (stressing "that in the case of the major projects, the owner is usually the taxpayer"); *id.* at 175-176 (discussing projects owned by the Seattle Department of Public Works, the Atomic Energy Commission, and the Army Corps of Engineers); *Hearings on Proposed Revisions of the Labor-Management Relations Act of 1947 Before the Senate Comm. on Labor and Public Welfare*, 83d Cong., 1st Sess. 1302 (1953) (testimony of G. Johnson) (prehire contracting is needed "because of the practical operational conditions under which millions of dollars of Federal and State and local competitive-bidding jobs are carried on"); *id.* at 1304 (discussing California state project and extensive "Federal work . . . in . . . the construction of highways, roads, dams"); *id.* at 1342-43 (testimony of J.J. O'Donnell, President of National Constructors Ass'n.) (discussing large projects for "the Atomic Energy Commission, the Army Corps of Engi-

Other materials on the nature of construction industry labor relations confirm that the same kind of contractual arrangements—reflecting the same kind of economic forces—characterized public and private construction projects. "Among the first project agreements" were those for the Grand Coulee Dam, the Shasta Dam, many other major dams in the West, atomic energy facilities and defense installations. The earliest of these agreements date back to the 1930s and 1940s. *See Labor Department Study, supra*, at 14 (quoted in full in BCTC Pet., at 11). Indeed, the Labor Department Study noted that such agreements were often used on projects involving "a great deal of public interest and often public funds." *Id. See also* p. 14, *supra*.

The available legislative materials not only demonstrate that Congress understood that public and private construction projects involved the same array of economic forces and arrangements; those materials also demonstrate that Congress recognized that on public projects—like private projects—such arrangements often reflected the preferences and economic interests of the project's owners.

Thus, a memorandum circulated by Representatives Thompson and Udall on the provision that would become §8(f) noted that prehire contracting had, for efficiency reasons, "been encouraged by the Atomic Energy Commission and other government agencies" in the construction of their own facilities. 2 NLRB, *Legislative History of the Labor Management Reporting and Disclosure Act of 1959*, at 1578 (memo cited in *Woelke & Romero*, 456 U.S. at 662 n.13). And, the same point was made 7 years earlier in the Senate Report recommending passage of the Taft proposal upon which NLRA § 8(f) was ultimately based. *See* S. Rep. 1509, *supra*, at 3 (explaining that "[t]he United States Government, in addition to its interest in the general welfare

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neers, the Army Chemical Corps, the Army Ordinance Department, the Department of the Navy, and General Services Administration").

and the vigor of the economy, is directly concerned in the proper pricing and completion of construction projects for defense installations and production facilities").[16]

C. The Decisions Relied On By The Court Below

The court of appeals reached its startling result by amalgamating two recent decisions of this Court, *Wisconsin Department of Industry v. Gould*, 475 U.S. 282 (1986) and *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1986), with a pre-*Garmon* decision, *Guss v. Utah Labor Relations Commission*, 353 U.S. 1 (1957). Proceeding in this way, the majority below arrived at a *per se* rule that state action which "directly interfere[s] with the collective bargaining process" is always preempted, regardless of whether the action is proprietary or regulatory. MWRA Pet. App. 30a. This *per se* rule is inconsistent with this Court's preemption jurisprudence in general and finds no support in the cases upon which the court of appeals relied.

First, as explained in the margin, the court of appeals simply misread *Guss*.[17]

Second, neither *Gould* nor *Golden State* supports the majority below.

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[16] This Report also illustrated the various "economic factors peculiar to the building and construction industry" with examples drawn from such public works projects as the construction of dams and defense installations. *Id.* at 3, 5. (For the connection between the Taft bill and § 8(f), see pp. 11-12 and nn.6 & 7, *supra*.)

[17] *Guss* involved the preemptive effect of one particular provision of the NLRA, § 10(a), 29 U.S.C. § 160(a), which grants the NLRB authority to enforce § 8's unfair labor practice provisions, and which also, in a proviso, grants the NLRB authority to enter agreements ceding to state agencies aspects of § 8 enforcement authority. The *Guss* Court held that a state labor board could not conduct unfair labor practice proceedings covering conduct within the NLRB's § 10(a) jurisdiction when the NLRB had declined to exercise its jurisdiction but had *not* entered into agreement ceding its authority to the state board. This narrow holding, anticipating *Garmon*, in no way suggests that the NLRA ousts all state actions relating to the collective bargaining process. *Compare* cases cited at note 14, *supra*.

1. *Gould*, contrary to the arguments of the ABC contractors and the conclusion of the court of appeals, did *not* involve truly proprietary conduct of a state. In contrast to the Authority's actions here, *Gould* involved a state's attempt to use its purchasing power *to regulate*. The Wisconsin statute before the Court barred any employer found by the NLRB to have violated the NLRA three times in a 5-year period from doing any business with the State. The *Gould* Court held that the debarment law conflicted with Congress' decision that the remedies administered by the NLRB be the exclusive remedies for NLRA unfair labor practices and that those remedies not include a debarment penalty. 475 U.S. at 286-87.

In reaching its conclusion, the Court did *not* declare that the proprietary nature of a state's interests and actions is irrelevant to preemption analysis. To the contrary, the Court rested its decision on its determination that Wisconsin was *not* motivated by—and was *not* serving—its proprietary interests. The State was instead acting only to further regulatory goals directly addressed by the NLRA. Wisconsin had admitted as much. *See id.* at 287 ("The State concedes, as we think it must, that the point of the statute is to deter labor law violations . . . . No other purpose could credibly be ascribed . . . .").

Because the Wisconsin debarment statute addressed employer conduct *unrelated* to the employer's performance of any contractual obligations to the State, and because the State's reason for doing so was to strengthen the NLRA's remedies and thereby deter NLRA violations as a general matter, Wisconsin's "debarment scheme [was] tantamount to regulation." *Id.* at 289.

The *Gould* Court stressed that it was "*not* say[ing] that state purchasing decisions may never be influenced by labor considerations." *Id.* at 291 (emphasis added). Moreover, the Court recognized that it was "*not* faced . . . with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs." *Id.* (emphasis added).

Here, not only can MWRA's actions "plausibly be defended as a legitimate response . . . to local economic needs," and not only are those needs manifestly the most obvious and rational explanation for the Authority's decision, but the district court explicitly found those needs to be the stimulus that provoked the Authority's response. *See* ——, *supra*.

2. a. On its facts, *Golden State* is inapposite. The *Golden State* Court held that the City of Los Angeles, acting in a *regulatory* capacity, was precluded from using the threat of not renewing Golden State's license to force the taxi company to settle its collective bargaining dispute with its employees' union. Reasoning from *Machinists*, the Court held that the City could not exercise its regulatory power of license nonrenewal to restrict Golden State's right to use lawful economic weapons in its dispute with its union. *See* 475 U.S. at 615-19.

In *Golden State*, then, the City wielded power that no mere purchaser of services has at his disposal. By forcing Golden State to choose between resisting its union's demands and entirely losing its right to do business with both private and public entities within the city limits, the City altered the market forces by which Congress intended such a labor dispute to be decided.

b. It is instructive to recast *Golden State*'s facts to make that case more analogous to this case. If the City of Los Angeles had purchased taxi services from Golden State to transport city employees, and the strike had succeeded in producing serious interruptions in the services the City had purchased, surely Los Angeles would have been free to advise Golden State that the City would take its business elsewhere unless satisfactory services were restored. No reasonable application of this Court's preemption decisions would command that Los Angeles continue to purchase Golden State's unsatisfactory services, even though the City's withdrawal of its business might well have a sig-

nificant impact on the collective bargaining between Golden State and its union. Were a court to force the City to continue its market relationship with Golden State—despite the unsatisfactory nature of Golden State's services—it would be the court, not the City, which would be overriding the economic forces which Congress intended should be given their play.

By the same token, any public purchaser of construction services deciding that its particular economic circumstances warrant a project labor agreement, may choose to do business only with construction contractors willing to enter into such an agreement. See —— *supra*. Confronted with such a purchaser, those contractors who do not normally enter such agreements, can alter their normal operating methods to secure the business opportunity at hand, or seek business from purchasers whose perceived needs do not include a project labor agreement. The NLRA contemplates that purchasers can bring just such economic pressures to bear and that construction contractors will respond by making just such choices.

* * * *

The decision below works a startling and unsupported inversion of usual principles of federalism, preemption, and national labor law. While private owner-developers are intended by the NLRA to be free to choose project labor agreements for their construction projects, state agencies alone are held to be foreclosed from that option—with potentially severe consequences for the progress of their work and for the interests of the people the agencies serve. Preemption is not lightly to be inferred. The court below made such an inference not to prevent a state agency from interfering with the operation of a federal statutory scheme, nor even to *extend* to a state agency the same federal regime applicable to all others, but to *deny* to a public agency the benefits the federal scheme extends to all others. The decision below errs not, as may often happen, by nudging congressional enactments or legal doctrines somewhat too far, but by abruptly and unaccountably standing them on their head.

CONCLUSION

For the above stated reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Nos. 91-261 and 91-274

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, PETITIONER

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, INC., PETITIONERS

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

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ALTERNATIVE QUESTION PRESENTED

Petitioners have misstated the true question presented in this case. The most significant issue before the Court is whether the process of private sector collective bargaining, previously characterized by this Court as the "cornerstone" of the National Labor Relations Act, will be protected from direct governmental interference in the form of union-only bid specifications for the construction of public works.

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On Writs of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Respondents (hereinafter "ABC") are individual non-union construction contractors and trade associations representing over 18,000 "merit shop" construction industry employers.[1] On March 5, 1990, ABC filed a Complaint and

[1] Most, though not all, ABC members are non-union companies. The guiding principle of the "merit shop" is that all construction work should be awarded and performed on the basis of merit, regardless of labor affiliations.

Motion for Preliminary Injunction against The Massachusetts Water Resources Authority ("MWRA"), Kaiser Engineers, Inc. ("Kaiser"), and the Building and Construction Trades Council (the "Trades Council") in connection with a $6.1 billion series of construction projects known as the Boston Harbor clean-up.

The Complaint and Motion challenged enforcement by the MWRA, a governmental agency, of certain provisions of an agreement negotiated by Kaiser on MWRA's behalf with the Council. That agreement, known as the Boston Harbor Project Labor Agreement (hereinafter the "Project Agreement"), had been incorporated into the bid specifications for all construction work on the Boston Harbor clean-up project. (MWRA Pet. App. 75a.). The challenged provisions require all bidders on the Projects to agree to be bound by one of several dozen union collective bargaining agreements, which are incorporated by reference. These union contracts contain forced membership and hiring hall requirements for all employees and impose restrictive work rules and benefit plan contribution requirements on all signatory employers. (MWRA Pet. App. 5a-6a)[2]

ABC's Motion for Preliminary Injunction did not seek to halt the clean-up project in any way or to delay the advertisement or award of project contracts. (J.A. 37). Nor did ABC seek an order enjoining the entire Project Agreement. Rather, ABC's Motion asked only that the district court enjoin enforcement of

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[2] By letter dated September 21, 1989, Respondent Fraser Engineering had protested enforcement of the MWRA Agreement to the Massachusetts Department of Labor and Industries ("the Department"). (Jt. App. 26). In the course of reviewing this protest, the Deputy General Counsel of the Department's Civil Division concluded, *inter alia*, that the Agreement constituted governmental interference with collective bargaining in violation of the National Labor Relations Act. (Jt. App. 96-97). On February 16, 1990, however, the Department of Labor and Industries denied Fraser Engineering's protest, albeit without commenting upon the Civil Division's concerns about federal preemption. (Jt. App. 26, MWRA Pet. App. 94a).

the Project Agreement to the extent that the Agreement required non-union contractors to agree to recognize and be bound by local union contracts as a condition for obtaining work on the Project. (J.A. 37).

On April 11, 1990, the district court denied ABC's motion. (MWRA Pet. App. 72a). On October 24, 1990, however, a unanimous panel of the United States Court of Appeals for the First Circuit issued an opinion and order enjoining enforcement of MWRA Bid Specification 13.1 in connection with the Boston harbor cleanup project. (MWRA Pet. App. 49a). The panel found that the Bid Specification was preempted by federal labor law, because it impermissibly interfered with and "virtually eliminated" the collective bargaining process between private employers and unions. (*Id.*)

On rehearing en banc, the First Circuit reaffirmed that Bid Specification 13.1 was unlawful because it did not fall within any exception to the preemption doctrine articulated by this Court in *Golden State Transit Co. v. City of Los Angeles*, 475 U.S. 608 (1986), *after remand*, 493 U.S. 103 (1989); and *Wisconsin Dep't. of Indus. v. Gould*, 475 U.S. 282 (1986). Associated Builders & Contractors of *Massachusetts/Rhode Island v. Massachusetts Water Resources Authority*, 935 F.2d 345 (1st Cir. 1991). (MWRA Pet. App. 1a).[3]

It is undisputed in this case that the MWRA is a governmental agency authorized by the Massachusetts legislature to provide water supply services and sewage collection, treatment and disposal services for the eastern half of Massachusetts. (MWRA Pet. App. 51a-52a). MWRA's responsibility for the Boston Harbor clean-up project is set forth in the

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[3] The First Circuit's decision was followed in *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367 (8th Cir. 1991), but was not adhered to in *Phoenix Engineering, Inc. v. M-K Ferguson of Oak Ridge Co.*, No. 91-5527 (6th Cir. June 11, 1992) and *ABC v. City of Seward*, No. 91-35511 (9th Cir. June 5, 1992).

MWRA's enabling statute, Mass. Gen. Laws Ch. 92, app. § 1-1, *et seq.*, and the Commonwealth's public bidding laws. Mass. Gen. Laws. Ch. 149, §§ 45A-45L and Ch. 30, § 39M. Pursuant to these laws, the MWRA owns the property, provides the funds for construction (assisted by state and federal grants), establishes all bid conditions, awards all contracts, pays the contractors, and generally exercises ownership over all aspects of the Project. (MWRA Pet. App. 52a). The state's competitive bidding laws, reflecting the true interests of the state government, mandate that the MWRA award all construction work to the lowest responsible bidder through full and open competition. Mass Gen. Laws, Ch. 30, §§ 39M.

The MWRA does not employ any of the construction workers on the Project. (Jt. App. 72, 83-84). Because of this restriction, in April 1988, the MWRA appointed a "Project Contractor," defendant Kaiser Engineers, Inc. ("Kaiser"), to oversee the construction of new treatment facilities and the upgrading of existing facilities required for the clean-up. Jt. App. 22, MWRA Pet. App. 74a). Kaiser, in turn, acted as the MWRA's agent in negotiating contracts on the agency's behalf. Pursuant to state law, the MWRA retained total responsibility for the project, and all contractors were required to meet conditions set forth in MWRA's bid specifications in order to receive contract awards. (Jt. App. 23).

As noted above, the Boston Harbor clean-up "project" is actually a series of public works construction projects scheduled to take place in numerous locations around the Boston area during a 10-year period.[4] Together with the so-called Central

[4] Petitioners have chosen to highlight the work to be performed at Deer Island due to its supposed inaccessibility. (Pet. Brief at 6). In fact, the MWRA Agreement was imposed without regard to project location and affects numerous off-Island projects. Moreover, contrary to Petitioners claims, even Deer Island is accessible from multiple venues, so as to allow separate entrances for union and non-union workers, if necessary. (MWRA Pet. App. 96a).

Artery highway project, on which state officials proposed to implement an identical project agreement prior to issuance of the present injunction, the construction work at issue here constitutes a substantial percentage of the State's entire public works budget for the foreseeable future.

In November of 1988, two member unions of the defendant Building and Construction Trades Council ("the Trades Council") picketed the Project and precipitated a brief work stoppage. The work stoppage was ended after only one day by establishment of separate entrances to the job site, a well-recognized method of maintaining continuity of work in the construction industry. (MWRA Pet. App. 96a-97a). Other threats were made to disrupt the work, but *no other significant disruption actually occurred. Id.*

Nevertheless, on May 22, 1989, Kaiser, acting as MWRA's agent, entered into the Project Labor Agreement with the Trades Council.[5] No hearings were held by the MWRA prior to authorizing these negotiations, to determine the degree to which threatened union disruptions were likely to delay the project. Nor was any consideration given to alternative means of maintaining production, such as enforcement of performance bonds, termination for non-performance, or establishing reserved entrances. (Jt. App. 25).

Instead, acting outside the scope of the state's own competitive bidding laws, and in response to union political pressure, MWRA authorized Kaiser to negotiate the union-only Agree-

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[5] The General Counsel of the National Labor Relations Board, in response to an unfair labor practice charge brought by another party against Kaiser, stated that there was "no contention" in that case that Kaiser was MWRA's agent with regard to the Project Labor Agreement. *Building and Construction Trades Council*, GC Mem. Op. No. 1-CE-71 (June 25, 1990). (BCTC Pet. App. 83a). The record in the present case is clear, however, as evidenced in the Agreement itself, that Kaiser acted as MWRA's agent in negotiating the Agreement. (MWRA Pet. App. 75a).

ment. The Agreement states on its cover page that it was negotiated by Kaiser "on behalf of" the MWRA, and with MWRA's express approval. (MWRA Pet. App. 75a). Both Kaiser and the Trades Council understood that the Agreement could not be implemented without MWRA's approval. (Jt. App. 76, 82). Subsequently, the MWRA did approve the Agreement and incorporated it into all advertisements for bids on Project contracts. (MWRA Pet. app. 141a).

The Agreement, which all contractors and subcontractors who bid on the Project must agree to sign pursuant to Specification 13.1, requires that member unions of the defendant Trades Council shall serve as the sole and exclusive bargaining representatives for all craft employees on Project contracts (Art. III, § 1), that all employees must be referred by local union hiring halls (*id.* §§ 2, 3), that all employees are subject to the unions' compulsory membership provisions and local collective bargaining agreements (*id.* § 4), that employees must seek redress only through the named unions (Art. VII), and that employers are bound by each of the Trades Council member unions' wage and benefit provisions, including apprenticeship programs. (Art. IX, XI). Employers are also required to make contributions to a variety of union benefit trust funds and to observe restrictive union work rules and job classifications. (Art. IX). (MWRA Pet. App. 75a).

Moreover, because the Agreement is incorporated into the bid specifications for all work on the Project, contractors cannot *bid* for this government work without waiving their rights to negotiate freely with a union representing a majority of their employees. Thus, the MWRA Agreement forces the Respondents and other contractors, both union and non-union, to abandon their right to negotiate their own terms of employment or to operate on a non-union basis, in order to obtain work on this Project. In addition, contractors must agree to provide the

governmentally mandated union fringe benefits set forth in the incorporated collective bargaining agreements.

The "union-only" restriction imposed on all successful bidders and subcontractors, effectively deters non-union contractors from bidding on Project work. The imposition of specific contract terms adversely affects numerous union contractors as well, by dramatically increasing the bargaining leverage held by the unions over them in the future. (Any refusal to accept the union's renewal terms would preclude the employer from working on the next phase of the 10-year project).[6] Finally, the Agreement deprives employees of Project contractors of their rights under § 7 of the NLRA to choose their own collective bargaining representative without having a union imposed on them by governmental action.[7]

Approximately 75% of all construction work in this country is performed on a non-union basis. (Jt. App. 17). Only 21% of all employees in the construction industry are union members. *Id.* In Massachusetts, more than 60% of all construction work is performed on a non-union basis. (Jt. App. 62). Non-union employers and employees have performed hundreds

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[6] For these and other reasons, ABC was supported in its opposition to the MWRA Project Agreement by the Utilities Contractors Association of New England (UCANE), a group consisting of predominately unionized contractors which filed an amicus brief in the court below. UCANE, along with the Associated General Contractors, a national association also containing many unionized members, are also filing as amici in the present proceeding, together with numerous non-construction industry groups such as the U.S. Chamber of Commerce, the National Right to Work Legal Defense Foundation and the Master Printers of America.

[7] Contrary to the Solicitor General's Brief, at 20, n.14, the Agreement does not preserve the right "guaranteed" to employees by Section 8(f) to petition the Board for an election to reject the union representative. Instead, the Agreement *penalizes* employees who reject any of the government-imposed unions, by removing the employees (and their employer) from the government project.

of construction jobs in Massachusetts working side by side with union contractors, without significant labor disruption. (*Id.*)

In the present case, as noted above, Bid Specification 13.1 was enjoined by the First Circuit Court of Appeals in October 1990. Since that time, notwithstanding the prior concerns expressed by the MWRA as to the effects of the injunction, there is no evidence that construction on the project has been subject to delay of any kind resulting from the injunction against the MWRA's enforcement of the union-only Project Agreement.

SUMMARY OF ARGUMENT

Petitioners have asked this Court to permit a government agency to impose union agreements on private construction contractors, upon threat of debarment from a large series of public works projects. In making this extraordinary request, Petitioners seek to rewrite thirty years of decisionmaking by the Court in the field of labor law preemption. Petitioners' basic arguments have previously been considered and rejected by the Court, and they must be rejected again, if the National Labor Relations Act's "free zone" around the process of collective bargaining is to have any meaning.

Contrary to Petitioners' claims, the 1986 decisions in *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986) and *Wisconsin Dept. of Industry v. Gould, Inc.*, 475 U.S. 282 (1986) directly control the outcome here. In these decisions, the Court firmly established that governments are prohibited from regulating or otherwise interfering with the process of private sector collective bargaining. This prohibition has been given effect, regardless of whether the state governmental agency acts through its spending powers or engages in conduct which otherwise might be permitted on the part of a private actor.

More than any previous state activity confronted by this Court, the MWRA's union-only requirement goes to the heart

of the collective bargaining process. The Project Agreement not only tells private employers which unions they must deal with, but also dictates the terms of the agreements which must be reached and disallows any use of economic weapons to achieve better results. This is not a "legitimate response to procurement constraints", but is a wholesale destruction of the collective bargaining rights of private employers.

Petitioners and their amici seek to excuse the MWRA's conduct by claiming that Sections 8(e) and 8(f) of the NLRA somehow authorize governments to impose union-only agreements in the construction industry. The plain language of the Act utterly refutes their claim, and the meager legislative history cited by Petitioners from the 1950's fails to support their position. Indeed, inasmuch as state court decisions of that era uniformly *barred* state governments from engaging in union-only construction, and Congress made no effort to change this settled rule, the only logical inference from 8(e)'s passage is that Congress wished to keep the states out of the process of private sector collective bargaining. Finally, the law is clear that, even if the MWRA were a private owner/proprietor of the Boston Harbor project, 8(e) would not permit the agency to engage in the conduct presently at issue, because the MWRA would still not be a "construction industry employer", as 8(e) requires.

In sum, Petitioners and their amici do not seek to preserve traditional notions of federalism, but wish instead to overturn thirty years of settled law by allowing unprecedented government interference in the collective bargaining process. Such a result would be a disaster for taxpayers, businesses and employees and would undermine the fundamental purposes of the NLRA. The Court of Appeals properly rejected Petitioners' claims and the decision must be upheld.

ARGUMENT

I. SETTLED PRINCIPLES OF LABOR LAW PREEMPTION COMMAND THAT THE FIRST CIRCUIT'S DECISION BE UPHELD

Contrary to Petitioners' claims, the outcome of this case is plainly controlled by two decisions of this Court issued in 1986: *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986), *after remand*, 493 U.S. 103 (1989); and *Wisconsin Dept. of Indus. v. Gould, Inc.*, 475 U.S. 282 (1986). These cases, both of which are firmly grounded in years of prior decisionmaking by the Court, conclusively establish that governmental entities are prohibited by the National Labor Relations Act from regulating or otherwise interfering with the process of collective bargaining in the private sector. The Court's holdings further make it clear that such governmental conduct is prohibited regardless of whether the government acts through its spending powers or engages in conduct which would otherwise be permissible on the part of a private entity.

As is further discussed below, Petitioners' arguments, and those of the United States as *amicus*, repeat almost verbatim arguments which this Court considered and flatly rejected in *Golden State Transit* and *Gould*. There is nothing about the present case which distinguishes it in any principled way from this Court's prior holdings prohibiting governmental interference with the process of private sector collective bargaining. The Court properly decided this issue in 1986 and Petitioners' attempts to rewrite the doctrine of labor law preemption must fail.

A. *Golden State Transit* and *Gould* Squarely Support the Decision of the Court of Appeals

The controlling nature of *Golden State Transit* and *Gould* in the present case can best be seen by reviewing the local governments' contentions in those cases and the broad nature of

the Court's language in rejecting those contentions. In *Golden State Transit*, the City of Los Angeles refused to renew the operating franchise of a taxi cab employer unless and until the employer settled a disruptive labor dispute by entering into a collective bargaining agreement with a local union. In arguments to this Court, the city asserted that it was not "regulating labor" but was simply "exercising a traditional municipal function in issuing taxi cab franchises." 475 U.S. at 618. Like the Petitioners here, the city further argued that it was protecting important local interests and was doing so in a manner which involved merely a "peripheral concern" of federal labor law. *Id.* at 612, 618, n.8.

In rejecting each of these arguments, this Court held:

> Free collective bargaining is the cornerstone of the structure of labor management relations carefully designed by Congress when it enacted the NLRA.... Even though agreement is sometimes impossible, government may not step in and become a party to the negotiations.... A local government, as well as the National Labor Relations Board, lacks the authority to "introduce some standards of properly 'balanced' bargaining power" ... or to define "what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining."

Id. at 619. With regard to the city's attempts in *Golden State Transit* to distinguish between its own conduct and other forms of "regulation", the Court observed:

> [T]he fact that the city acted through franchise procedures rather than a court order or a general law is irrelevant to our analysis. Judicial concern has necessarily focused on the nature of the activities which the states have sought to regulate, rather than on the method of regulation adopted.

* * *

> "We recently rejected a similar argument to the effect that a state's spending decisions are not subject to preemption." [*Citing Wisconsin Department of Industry v. Gould, Inc.*]

Id. at 614, n.5 and 618. Finally, in dismissing the city's claim that its actions only involved a "peripheral concern" of Federal labor law, the Court stated: We hold that the city directly interfered with the bargaining process—a central concern of the NLRA. . . ." *Id.* at 618, n. 8.

Three years after *Golden State Transit I*, this Court reaffirmed its holding, after remanding for consideration of whether the taxicab employer's rights under the NLRA were enforceable against the city under 42 U.S.C. § 1983. *Golden State Transit Corp. v. City of Los Angeles (Golden State II)*, 493 U.S. 103 (1989). In holding that enforceable rights were indeed created, the Court further clarified and strengthened its initial holding, in language directly applicable here. As the Court stated:

> . . . Congress intended to give parties to a collective bargaining agreement the right to make use of "economic weapons," not explicitly set forth in the Act, free of governmental interference. "[T]he congressional intent in enacting the comprehensive federal law of labor relations" required that certain types of peaceful conduct "must be free of regulation." The *Machinists* rule creates a free zone from which all regulation "whether federal or State," . . . is excluded.
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> The *Machinists* Rule is not designed . . . to answer the question whether state or federal regulations should apply to certain conduct. Rather, it is more akin to a rule that denies either sovereign the authority to abridge a personal liberty.

Id. at 111-112. Finally, the Court held, in language squarely applicable to the arguments being presented now by the Petitioners:

> The rights protected against state interference, moreover, are not limited to those explicitly set forth in Section 7 as protected against private interference. The NLRA has long been understood to protect a range of conduct against state but not private interference.

Id. at 110.

As noted above, *Golden State Transit* was the culmination of a series of cases prohibiting governmental interference with the process of private sector collective bargaining. The decision was soundly based upon principles set forth in *International Assn. of Machinists, Lodge 76 v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). *See also, Teamsters v. Morton*, 377 U.S. 252, 258-259 (1964); *Bus Employees v. Missouri*, 374 U.S. 74 (1963); and *Bus Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383 (1951). In each of these and other cases, this Court acted to prevent states from dictating the outcome of collective bargaining in the name of "labor peace", where the state's action interfered with the parties' own rights to make use of "economic weapons", "a 'right of the employer as well as the employee'". *Machinists*, 427 U.S. at 147.

In *Golden State Transit*, the Court repeatedly cited the other significant preemption decision of 1986, *Wisconsin Dept. of Indus. v. Gould, Inc.*, 475 U.S. 282 (1986). In *Gould*, the State of Wisconsin attempted to prohibit its agencies from entering into procurement contracts with persons or firms who had been found to have violated the National Labor Relations Act more than a certain number of times. This Court properly found the state's action to be preempted by the NLRA, applying principles first set forth in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

Again, arguments which the state made in the *Gould* case are revealing, as they mirror almost exactly the contentions of the Petitioners here. Specifically, the state argued that its refusal to deal with labor law violators escaped preemption because the refusal was "an exercise of the state's spending power rather than its regulatory power". 475 U.S. at 287. The Court replied that this was "a distinction without a difference". *Ibid.* The state also contended that its action was somehow protected by the "market participant" doctrine set forth in certain cases decided under the Commerce Clause. Again, the Court rejected this theory, holding: "[T]he 'market participant' doctrine reflects the particular concerns underlying the Commerce Clause, not any general notion regarding the necessary extent of state power in areas where Congress has acted." *Id.* at 289.

Finally, the state argued in *Gould* that its conduct should have been allowed, because the NLRA permitted *private* purchasers of contract services to engage in exactly the behavior for which the state sought approval, another argument relied on heavily by the Petitioners here. The Court squarely rejected the government's position in *Gould*, however, holding as follows:

> Government occupies a unique position of power in our society, and its conduct, regardless of form is rightly subject to special restraints. Outside the area of Commerce Clause jurisprudence, it is far from unusual for Federal law to prohibit states from making spending decisions in ways that are permissible for private parties. [citations omitted]. The NLRA, moreover, has long been understood to protect a range of conduct against state but not private interference. [citing *Machinists*]. The Act treats state action differently from private action not merely because they frequently take different forms, but also because in our system states simply are different from private parties and have a different role to play.

Id. at 290. Accordingly, the Court properly found that a state's refusal to deal with a private contractor, based solely upon actions of that employer regulated by the NLRA, was preempted.

As this Court has noted, and as the First Circuit properly held, the *Machinists* and *Garmon* doctrines, culminating in *Golden State Transit* and *Gould* respectively, are distinct theories under which the implied preemption of the NLRA is given its full effect. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 748 (1985). It is significant, however, that on the issues of greatest importance to the present case, both of the opinions in *Golden State Transit* repeatedly cite to *Gould*, and *Gould* in turn cites to *Machinists*, thus unifying the two doctrines in a way which fatally undermines the Petitioners' claims.

Specifically, as noted above, the Court in *Golden State Transit* cited *Gould* in rejecting the city's contention that the particular form of its actions should somehow be distinguished from otherwise preempted "regulation". Whether viewed as a franchising action or a proprietary procurement, the Court correctly focused on the "nature of the activities affected," *i.e.*, private collective bargaining, rather than the "method adopted" by the state. *Golden State Transit I*, 475 U.S. at 614, n.5.

Similarly, in rejecting the city's claim that its actions should be judged by the same standard applicable to private sector conduct, the *Golden State Transit* opinion again cited *Gould* for the proposition that "the NLRA . . . has long been understood to protect a range of conduct against state but not private interference." *Id.*

In any event, both doctrines of labor law preemption conclusively support the decision of the Court of Appeals in the present case and compel rejection of the Petitioners' claims, which are almost exactly repetitious of arguments already settled by the Court. In the present case, the MWRA, like the City

of Los Angeles in *Golden State Transit*, has attempted to coerce private contractors into reaching agreements with labor unions, an action which clearly goes to the heart of the collective bargaining process. Indeed, in the present case the governmental entity has, in the words of the Court of Appeals, "eliminated the process altogether". Pursuant to the Project Agreement, the MWRA has named the unions with which the private contractors must deal, has dictated the terms of the agreements, and has disallowed all economic weapons necessary to alter the agreements. Such pervasive interference with collective bargaining far exceeds the actions which this Court prohibited in *Golden State Transit* and *Gould* and certainly should not be permitted.

Similarly, for the reasons stated in both *Golden State Transit* and *Gould*, the Court of Appeals was completely correct in finding that the government's actions were no less impermissible because their coercive effects arose under the guise of the exercise of state spending powers. *Golden State Transit*, 475 U.S. at 614; *Gould*, 475 U.S. at 286. Finally, the Court of Appeals properly followed this Court's holdings, that with respect to labor law preemption, the NLRA protects private employers against state interference, regardless of whether similar actions might be permissible on the part of purely private entities. *Golden State Transit II*, 493 U.S. at 110; *Gould*, 475 U.S. at 290.

As will be further demonstrated below, the Petitioners' attempts to distinguish *Golden State Transit* and *Gould* and to rewrite the Court's settled doctrines of labor law preemption are unavailing. From the plain language of this Court's decisions and the Act itself, it is clear that there is no basis for the MWRA's unprecedented intrusion into the collective bargaining processes of private contractors who seek only to do business with the state on fair and equal terms.

B. The MWRA's Union-Only Requirement Does Not Fall Within Any Recognized Exception to Labor Law Preemption

Petitioners have argued that *Golden State Transit* and *Gould* are somehow distinguishable from the present case and that the MWRA's actions should be deemed to be "peripheral" to the interests regulated by the NLRA. (Pet. Br. at 25-26; Sol. Gen. Brief at 23-24). It is significant, however, that neither the Petitioners nor the Solicitor General have cited a single decision of this Court which has permitted either the state or federal government to impose collective bargaining agreements on private employers under *any* circumstances. Rather, this Court has made it clear that such direct interference with the process of private sector collective bargaining can never be deemed to be "peripheral" to interests regulated by the NLRA, because the collective bargaining process is the "cornerstone" of the Act. *Golden State Transit I*, 475 U.S. at 619.

For these reasons, Petitioners' reliance on such cases as *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), and *New York Tel. Co. v. New York Dept. of Labor*, 440 U.S. 519 (1979), is utterly misplaced. (Pet. Br. at 21-24). In these cases, the state actions at issue did not impose collective bargaining agreements or union recognition on private employers. Instead, the states in each case merely established some term of employment or otherwise took an action which only "related" to collectively bargained working conditions. *See Metropolitan Life Ins., supra*, 471 U.S. at 758 (state law designated minimum health care benefits); *Fort Halifax, supra*, 482 U.S. at 23 (state mandated severance benefits); *New York Tel. Co., supra*, 440 U.S. at 546 (payment of unemployment insurance to strikers); *see also Belknap v. Hale*, 463 U.S. 491 (1983) (dealing with strike replacements); *Youngdahl v. Rainfair*, 355 U.S. 131 (1957) (allowing states to enjoin mass picketing and violence).

In the present case, however, the MWRA is intruding into the collective bargaining process in an all-pervasive and unprecedented way. The MWRA bid requirements do far more than "touch on" an area of labor relations. *Metropolitan Life Ins.*, 471 U.S. at 757. They establish how the process will work and with whom the employers must deal. The bid specification also removes all economic weapons from the employers' hands, and finally, the government here has dictated the outcome of the "negotiations". Under any conceivable reading of this Court's preemption doctrine, such governmental action cannot stand.[8]

For similar reasons, Petitioners' attempt to claim support for their position from *Gould's* references to "legitimate responses to state procurement constraints or to local economic needs," is completely misplaced. (Pet. Brief at 34). In observing that it was "not saying that state purchasing decisions may never be influenced by labor considerations," 475 U.S. at 291, the Court merely repeated settled *Garmon* principles which do not apply here. A state may well "touch upon" or "be influenced by" labor issues in its dealings with government contractors, but government is *never* permitted to tell those contractors with whom they must bargain and what they must agree to. *See H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970). That is not a "legitimate"

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[8] For this reason, Petitioners are simply wrong to claim that a "recasting" of *Golden State Transit's* facts into a "market transaction" would render the holding inapposite. (Pet. Brief at 35-36). If the city had merely refused to deal with the cab company "until satisfactory service was restored," as Petitioners suggest, then it would not have been conditioning its procurement of services on the company's entering into a collective bargaining agreement, as has occurred here. As the Supreme Court stated in *Golden State Transit*: "Our holding does not require a city to renew or to refuse to renew any particular franchise. We hold only that a city cannot condition a franchise renewal in a way that intrudes into the collective bargaining process." 475 U.S. at 619. In the present case, the MWRA has not "insisted that non-union companies provide satisfactory service;" it has debarred them altogether, based solely on their non-union status, without so much as an opportunity for them to perform.

governmental response but instead constitutes direct interference with private sector collective bargaining. Petitioners failure to recognize this distinction undermines their entire claim.

Finally, Petitioners and their amici seek to apply misguided notions of federalism to this case, citing numerous cases outside the context of labor law. (Pet. Brief at 20-22; Sol. Gen. Brief at 14). A review of this Court's decisions on preemption under different statutes, however, is of little value here, revealing only that each case turns significantly on its statutory context. *Compare Gade v. National Solid Waste Mgmt. Assn.*, 60 U.S.L.W. 4587 (1992) (OSHA standard found to preempt state law); and *Cippolone v. Liggett Group, Inc.*, 60 U.S.L.W. 4703 (1992) (state laws relating to cigarettes found to be partially preempted). Thus, whatever may be the validity of Petitioners' claim that the Court is "reluctant" to infer federal preemption under other statutes (Pet. Brief at 21), that characterization is flatly wrong with regard to labor law preemption. In cases decided under the NLRA, the Court has repeatedly held that the Act creates a "free zone" around the process of private sector collective bargaining, protecting it from all governmental interference. *Golden State Transit II*, 493 U.S. at 111.

In any event, the present case does not present a true issue of federalism, because the *Machinists/Golden State* doctrine on which the Court of Appeals principally relied applies equally to federal and state government actions. As this Court held in *Golden State Transit*:

> The Machinists rule is not designed . . . to answer the question whether state or federal regulations should apply to certain conduct. Rather it is more akin to a rule that denies either sovereign the authority to abridge a personal liberty.

Id. at 112.

In short, the present case is not about "states' rights," but is about protecting the collective bargaining process from interference by government in general. This Court has held that the NLRA squarely prohibits any such governmental interference, and the MWRA's union-only requirement plainly runs afoul of this prohibition. For each of these reasons, the Court of Appeals decision should be affirmed.[9]

II. PETITIONERS' ATTEMPT TO CREATE A SPECIAL CONSTRUCTION INDUSTRY EXEMPTION FROM THIS COURT'S SETTLED PRINCIPLES OF LABOR LAW PREEMPTION SHOULD BE REJECTED

Confronted with this Court's consistent prohibition against governmental interference with collective bargaining, as set forth above, both the Petitioners and their amici have attempted to rewrite history and create a special exemption for such governmental interference in the construction industry, relying on Sections 8(e) and 8(f) of the National Labor Relations Act. (Pet. Brief at 24-33; Sol. Gen. Brief at 19). According to the Petitioners: "In enacting NLRB Sections 8(e) and 8(f), . . . Congress expressly expanded the options available to the industry participants who advanced their economic interests. . . . By denying one option to public owner developers that is available to private owner-developers, the decision below places

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[9] Unlike Petitioners, the Solicitor General has frankly conceded that "a State could not require that an employer negotiate or be bound by a prehire agreement with a union as a condition of obtaining a state contract outside the construction industry." (Sol. Gen. Brief at 20, n.14). This concession seriously undermines Petitioners' claims that the MWRA's proprietary interests, in and of themselves, somehow exempt the state's conduct from labor law preemption. In any event, as is further shown below, there is no statutory basis for treating the construction industry differently with regard to prohibiting governmental interference with collective bargaining.

a restriction on Congress's intended free play of economic forces." *Id.* at 25.[10]

In order to draw support for their positions from the NLRA, however, Petitioners are forced to ignore the plain language of the Act and to distort its legislative history. The Petitioners also fundamentally misrepresent the history of governmental intrusion, or lack thereof, in the process of private sector collective bargaining. Finally, at crucial points in their analysis, Petitioners ignore important holdings of this Court which have expressly prohibited the results they seek to achieve.

A. Congress's Passage of Sections 8(e) and 8(f) of the National Labor Relations Act Provides no Basis for Permitting Governmental Interference With Private Sector Collective Bargaining

The Court of Appeals correctly found that Sections 8(e) and 8(f) of the NLRA have no relevance to the decision in this case. (MWRA Pet. App. 24a-25a). By their express terms, these sections of the statute say nothing about the right of governments, state or federal, to dictate terms of collective bargaining agreements to private contractors. As Petitioners have conceded (Pet. Brief at 27), both sections deal only with permitted activities of "employers in the construction industry", whereas political subdivisions are expressly excluded from the definition of "employer" by Section 2(2) of the Act.

In light of this Court's previous holdings that the Act as a whole prohibits governmental entities from mandating or otherwise interfering with the process of collective bargaining between unions and private employers, it is Petitioners' burden to

[10] The Solicitor General similarly complains that the First Circuit treated state and local governments "differently from all other employers - and all other owners and developers of property - by uniquely prohibiting them from implementing the very sort of project labor agreement that is expressly authorized by Sections 8(e) and 8(f) of the Act." (Sol. Gen. Brief at 14).

demonstrate how 8(e) and 8(f) create an exception to this rule. In other words, the Petitioners must show that 8(e) or 8(f) expressly authorizes public entities to engage in conduct which the Act otherwise preempts.

The first flaw in Petitioner's argument is that they do not accept this burden, but instead seek to reverse it, claiming that "the Act nowhere expressly prohibits a state or local government from engaging in any particular transactions." (Pet. Brief at 27). According to the Petitioners, this "omission" supposedly suggests that state proprietary actions do not run afoul of the Act.[11] Yet, as has been demonstrated above, this Court has already settled that the Act *does* prohibit the NLRB and other governmental entities from imposing collective bargaining agreements on private employers, whether through proprietary actions or otherwise. *Golden State Transit*, 493 U.S. at 109; *Gould*, 475 U.S. at 291.[12] Viewed in this light, the fact that Sections 8(e) and 8(f) say nothing about the rights of public entities simply leaves intact this Court's presumption that governmental actions are prohibited if they interfere with the process of private sector collective bargaining.

Having overlooked this initial presumption, the Petitioners (and the dissent below) seek to explain Section 8(e) and 8(f)'s use of the term "employer" by observing that these provisions are themselves exceptions from forbidden practices which do not apply to state governments. (Pet. Brief at 27). Again, however, this circular argument only confirms the findings of

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[11] Later, Petitioners assert as a "basic legal principle" that "in the absence of any express indication of a congressional intent to preempt state actions, an inference of such intent is disfavored." (Pet. Brief at 29).

[12] Petitioners' view of the Act is further undermined by the existence of Section 8(d), which has been interpreted as an express prohibition against any attempt by a governmental agency to compel employers to agree to any collective bargaining proposal. *See H.K. Porter, Co. v. NLRB*, 397 U.S. 99, 103 (1970).

the Court of Appeals majority, *i.e.*, that 8(e) has *nothing to do* with what is permitted or prohibited for a governmental actor. Accordingly, 8(e) does not change the underlying prohibition against governmental interference with private sector collective bargaining which this Court has inferred from the Act as a whole.

Next, having wrongly criticized the Court of Appeals for failing to apply section 8(e) to the actions of the MWRA, Petitioners accuse the Court below of improperly "ignoring the fact that the MWRA is not purporting to act as an 'employer' within the meaning of the Act." (Pet. Brief at 28). Yet, it was only because the Petitioners claimed that 8(e) somehow immunized their conduct that the Court of Appeals was constrained to point out that the MWRA failed to meet the terms of the provisions which the Petitioners themselves had identified.

Petitioners are quite correct that the MWRA is not an "employer" within the meaning of the Act and has not acted as one at any point in this case. That concession, however, utterly deprives the Petitioners of any claim to authorization for their actions as a governmental "proprietor". Again, lacking status as an "employer" under the Act, but nevertheless forcing private contractors who *are* employers to adopt collective bargaining agreements, the MWRA can identify no basis for exempting itself from established principles of labor law preemption.[13]

These errors of logic lead the Petitioners to their next faulty premise, that the definition of "employer" in Section 2(2)

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[13] Petitioners again miss this point by asserting that the Court of Appeals' opinion would somehow prohibit railroads and airlines from enforcing union-only project agreements, since they too are not "employers" within the meaning of the Act. (Pet. Brief at 29). There is, of course, no principle of labor law preemption that prohibits railroads or airlines from engaging in *any* activities available to private companies. It is the principles of labor law preemption which prohibit the MWRA from interfering in the process of private sector collective bargaining.

evidences a congressional intent to permit states and their subdivisions "greater freedom" than is available to private entities. (Pet. Brief at 29). Petitioners claim that Congress did not intend the express exemption of the states from obligations under the Act to *decrease* the states' freedom of action. (*Ibid.*).

It is a truism that the NLRA contains no restriction on the conduct of governmental entities towards their own employees. But when a government agency, either a state or the NLRA, purports to coerce private employers in their collective bargaining relationships, then Petitioners are simply wrong: The Act plainly *does* restrict government action in this area.

ABC has already set forth above the language of this Court explicitly holding that the NLRA provides greater protection against governmental conduct which infringes on private action than it provides against the conduct of other private actors. *Golden State Transit II*, 493 U.S. at 110; *Gould*, 475 U.S. at 290. Thus, when the government comes into contact with the private sector, this Court has established the "free zone" around the process of collective bargaining which clearly does impose special restrictions on state actors to prevent them from intruding into that process. Petitioners' arguments have completely overlooked this settled principle of labor law preemption and are fatally flawed.

Finally, the Solicitor General asserts that *Golden State Transit* only prohibits state action which "intrudes upon private conduct that Congress had intended to be unregulated . . . ." (Sol. Gen. Brief at 17). According to the Solicitor, 8(e) and 8(f) show that "Congress chose not to leave unregulated the use of project labor agreements in the construction industry." (*Ibid.*). Hence, state regulation is permitted as well. *See Phoenix Engineering Co. v. MK-Ferguson of Oak Ridge*, No. 91-5527 (6th Cir. June 11, 1992).

This tautological reasoning misreads *Golden State Transit* and the *Machinists* doctrine. The issue in those cases was not

whether "Congress" regulated the process of collective bargaining, but whether Congress intended to allow state or federal agencies to supplement the Act with regulations of their own. *Golden State Transit I*, 475 U.S. at 614-615. Similarly, in *Gould*, the Court noted that the Act authorized private employers to refuse to deal with companies having labor disputes. 475 U.S. at 290. Congress did not authorize public agencies to engage in the same conduct, however, and so state action of this type was held to be prohibited.

So, too, whereas 8(e) and 8(f) clearly authorize certain *private* employer behavior in the construction industry, these provisions say nothing about increasing the power of state agencies or the NLRB to interfere with the process of collective bargaining. Indeed, the Petitioners' reading of the Act is directly contrary to this Court's holding in *NLRB v. Ironworkers Local 103 (Higdon Const.)*, 434 U.S. 335, n.10 (1977), where the Court stated:

> "Congress was careful to make its intention clear that pre-hire agreements were to be arrived at voluntarily, and no element of coercion was to be admitted into the narrow exception being established to the majority principle."

There is simply no basis for saying that Congress's authorization of private conduct constitutes an invitation to either the state or the NLRB to *compel* such conduct.

Thus, Petitioners and their amici have failed to demonstrate that Sections 8(e) or 8(f) of the NLRA provide any basis whatsoever for creating an exception from the well settled preemption of the NLRA. The plain language of the Act establishes that it has no bearing on this case whatsoever, just as the Court of Appeals held.

B. The Legislative History of Sections 8(e) and 8(f) Does Not Reveal any Congressional Intent to Permit the MWRA's Union-Only Requirement

Having failed to overcome the plain language of Sections 8(e) and 8(f), which establish by their terms that they contain no authorization for government entities to impose collective bargaining agreements on private employers, Petitioners seek to infer such an intent from the legislative history surrounding the 1959 enactment of these provisions. At the same time, Petitioners seek again to rewrite history by claiming without factual support that governmental union-only project agreements were "common" prior to enactment of 8(e) and 8(f) and that Congress should be presumed to have intended those provisions to permit the type of conduct at issue here. Petitioners are utterly wrong in their analysis of Congress's legislative intent, and they are grossly mistaken as to the involvement of public sector construction users in union-only project agreements prior to 1959 or thereafter.

At the outset, it is completely inappropriate to delve into the legislative history of Sections 8(e) and 8(f) when, as shown above, the plain language of those provisions excludes political subdivisions from their coverage. 29 U.S.C. § 2(2). It is a well settled principle of statutory construction that the Court should examine legislative intent only when the plain language of a statute is ambiguous. *FMC v. Holliday Corp.*, 498 U.S. 111, S. Ct. 403, 407 (1990) (requiring adherence to the "language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose"); *accord, Morales v. Trans World Airlines, Inc.*,____ U.S.____, 112 S. Ct. 2031, 2036 (1992). *See also West Virginia Univ. Hospitals, Inc. v. Casey*,____ U.S.____, 111 S. Ct. 1138, 1147 (1991) (refusing to permit statutory text to be "expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.").

There is no claim that Section 2(2) of the Act is in any way unclear as to its exclusion of governmental entities from the coverage of Sections 8(e) or (f). Thus, an examination of the legislative intent surrounding 8(e) and (f) is a meaningless exercise, as the Court of Appeals recognized. (MWRA Pet. App. 25a).

Moreover, the types of legislative history most heavily relied upon by the Petitioners and the Solicitor General, *i.e.*, hearing testimony before Congressional Committees which took place nearly a decade prior to passage of the amendments at issue here, and which were not cited in any floor debate by any Congressional sponsor of the amendments leading to Sections 8(e) or 8(f), are the type of legislative history which has previously been identified by this Court as carrying the least possible weight. *See Dept. of State v. Washington Post Co.*, 456 U.S. 595 (1982) ("Passing references and isolated phrases are not controlling when analyzing a legislative history.").

In any event, a review of the random comments parsed out of the record by Petitioners fails to locate enough specific information about the project agreements mentioned to support Petitioners' exaggerated claims. In particular, none of the project agreements referred to clearly imposed union-only agreements on unwilling government contractors. In addition, in none of the projects cited does it appear that the government acted as a party in interest to the agreement, as is true here.

As ABC demonstrated to the Court of Appeals, most if not all labor stabilization project agreements which have been entered into by public sector construction users, prior to recent years, have merely specified certain uniform terms or conditions of employment, and have said nothing about requiring contractors to agree to union representation or sign collective bargaining agreements with such unions. (Jt. App. 113: Md. Harbor Tunnel Agreement).[14]

[14] It is worth reiteration that ABC has never opposed the Project Agreement merely because it establishes specific terms or conditions of employ-

The various projects referred to in the Congressional hearings all appear to be of the "labor standards" type, as opposed to imposing union-only requirements. At best, the sporadic references cited by Petitioners fail to say what type of project agreements are being discussed. *See, e.g.*, Memorandum of NLRB Chairman Reynolds, reporting projects on various public works, none of which apparently involved a union-only project agreement. Hearings on S.1973 Before the Subcomm. on Labor and Labor-Management Relations of the Senate Comm. on Labor and Public Welfare, 82nd Cong., 1st Sess. 31, 87,97, 103, 105 (1951). Even the descriptions of "project agreements" set forth in Petitioners' brief fail to refer to any union-only subcontracting clauses, but characterize the normal project agreement as merely standardizing wages and other conditions and perhaps including a no-strike clause.

Even more importantly, none of the public works projects referred to in the remarks selected by Petitioners gives any indication that the *government* acted as a party in interest to the agreements referred to. Absent such evidence, there is certainly no reason to believe Congress intended to authorize government agencies to assume this new role.

In short, the meager references to project agreements on public works identified by the Petitioners simply cannot form the basis for a broad new exemption from the established principles of labor law preemption consistently enforced by this Court for more than thirty years.

Of equal significance, but again overlooked by the Petitioners, is the fact that virtually every state court which had an opportunity to rule directly on local government attempts to impose union-only requirements on construction projects prior

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ment, but has sought to enjoin only those aspects of the Agreement which require private contractors to recognize unions and to adopt collective bargaining agreements. (Jt. App. 37).

to 1959 held such governmental requirements to be unlawful under state and/or federal law. For example, the Court of Appeals of Maryland held in *Mugford v. Mayor and City Council of Baltimore*, 185 Md. 266, 44 A.2d 745 (1945), that a state government's imposition of union-only requirements in connection with a public construction project "would not only be unlawful but would tend to constitute a monopoly of public service by members of a labor union, which the law does not countenance."

Similarly, in Ohio, the Supreme Court of that state declared that public construction contracts could not be denied to the lowest bidder based solely on the fact that the bidder did not employ union laborers. *State ex rel. United Dist. Heating v. State Office Bldg. Comm'*, 125 Oh. State 301, 181 N.E. 129 (1932). *See also*, *Anthony P. Miller v. Wilmington Housing Auth.*, 165 F. Supp. 275, 280 (D. Del. 1958) (municipal corporation cannot discriminate in favor of organized labor in awarding construction contracts); *Davenport v. Walker*, 68 N.Y. 161 (1901) (board of supervisors enjoined from awarding construction contract to other than lowest bidder because requiring contractor to utilize union labor was violation of public policy); *Elliott v. City of Pittsburgh*, 6 Pa. Dist. Rpts. 455, 456 (1897) (city had no right to designate Building Trades Council of Pittsburgh as only workmen to be employed on city construction work); *Wright v. Hoctor*, 145 N.W. 704 (Neb. 1914) (union labor provision for public works projects unconstitutional and invalid); *Lewis v. Bd. of Education of Detroit*, 102 N.W. 756 (Mich. 1905) (Board of Education has "no power to require contractors constructing public buildings to employ union labor exclusively"); *Adams v. Brenan*, 52 N.E. 314 (Ill. 1898) (board of education enjoined from entering contract providing for union-only labor in school construction because contract discriminates "between different classes of citizens" and is of a nature "to restrict competition and increase the cost of the work").

In Massachusetts itself, the law was clear in 1959, as it is today, that the state could not require public works contractors to sign collective bargaining agreements in order to obtain a state contract. *See* M.G.L. c.30, § 39M, which requires all contracts to be awarded to the lowest responsible and eligible bidder.[15]

Thus, far from confirming Petitioner's claim that "the same kind of contractual arrangements . . . characterized public and private construction projects" prior to the passage of 8(e) (Pet. Brief at 32), these cases show that union-only construction requirements, at the state level at least, were *routinely barred* throughout the country.[16] Based on this public record, and the failure of Congress anywhere to expressly *permit* governmentally mandated collective bargaining agreements, the only logical inference is that Congress had *no* intent to alter the well settled policy of keeping government entities out of private labor negotiations.

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[15] The Massachusetts Supreme Court reaffirmed this prohibition in *Modern Continental Const. Co., Inc. v. Mass. Port Authority*, 369 Mass. 825, 829-30 (1976), holding as follows: "Unionism is not a statutory requirement to be deemed 'responsible' or 'eligible' as those terms are used in M.G.L. c.30, § 39M, and the statute itself would bar automatic exclusion of any bidder on the sole ground that the bidder employs nonunion workers." *Id.* at 829.

[16] As it happens, this was the law in the federal sector as well. *See* 31 Comp. Gen. 561 (May 2, 1952), in which the Comptroller General of the United States declared: "No statute requires the employment of union labor by Government contractors, and generally there would be no legal justification for the rejection of the lowest bid received solely because of the fact that the low bidder may not employ union labor." *See also* 42 Comp. Gen. 1 (July 2, 1962).

C. The MWRA's Actions Would Not Be Protected by Sections 8(e) or (f) Even if the MWRA Were a Private Owner

The final glaring defect in Petitioner's reliance on Sections 8(e) and 8(f) is that, if the MWRA were somehow allowed to do whatever 8(e) permits a private property owner to do, then the agency's action would *still* be unlawful, because *8(e) does not protect the conduct at issue here.* By its terms, 8(e) allows private construction users to impose union-only requirements only if they are themselves "employers . . . in the construction industry." The NLRA has consistently held that property *owners* are not covered by the 8(e) exemption if they are not in fact "construction industry employers". *See Clark v. Ryan*, 818 F.2d. 1102 (4th Cir. 1987); *Carpenters Local 1149 (American President Lines, Ltd.)*, 221 NLRB 456, 460-61 (1975); *enfd* 81 Lab Cases (CCH) ¶ 13137 (D.C. Cir. 1977); *Columbus Bldg. & Const. Trades Council (Kroger Co.)*, 149 NLRB 1224, 1225-6 (1964). This means they must actually employ construction workers on the project, or at least have a likelihood of employing them by virtue of contractual arrangements. They must also be employers in the "construction industry", not some other field such as waste management.[17]

In the present case, even a fictitiously private MWRA would still fail to meet either of the tests spelled out in 8(e). MWRA is an owner/operator of the Boston Harbor treatment facilities; it is not a construction company. More importantly, it is undisputed that MWRA is not authorized to act as an

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[17] *A.L. Adams Constr. Co. v. Georgia Power Co.*, 733 F.2d 853 (11th Cir. 1984), a case on which Petitioners erroneously relied in the court below, is not to the contrary. That case held only that an owner who acts as its own general contractor may be deemed to be a "construction industry employer" for purposes of 8(e). *See* 733 F.2d at 854 and n.3, 858. It is undisputed here that the MWRA is acting as neither an employer nor a general contractor on the Boston Harbor clean-up projects.

employer of any workers on this construction project. Thus, even a private MWRA would not be entitled to enter into or enforce a union-only project agreement.

The General Counsel opinions cited by Petitioners make this point clear. In *Morrison-Knudson Co., Inc*, 13 NLRB Advice Mem. Rep. ¶ 23,061 (Mar. 27, 1986) (BCTC Pet. App. 97a), for example, the NLRB's General Counsel declined to issue an unfair labor practice complaint only because she found that the owner of the project, Saturn Corporation, was not a "party in interest in the agreement". The General Counsel also found that no action by the owner was required to implement the agreement in that case.

By contrast, the project agreement here states that it has been negotiated by Kaiser, "acting as agent for the MWRA." (MWRA Pet. App. 75a). Perhaps more importantly, the MWRA's role here is crucial to the implementation of the Agreement, as all contractors must sign the MWRA's Bid Specification 13.1 in order to work on the project. Such activity by a non-construction industry employer is not permitted under Section 8(e). *See also Connell Const. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 621-635 (1975) (prohibiting union-only subcontracting agreements between unions and "stranger" contractors, *i.e.*, parties with whom there was no collective bargaining relationship).

Thus, even if the MWRA were granted its wish to be treated like a private owner of a construction project, its actions would be unlawful. Contrary to Petitioners' claims, 8(e) does not permit a private *non*-construction industry *non*-employer to impose union-only requirements on the construction contractors seeking to build its project.

Therefore, Petitioners' attempt to create a special 8(e) exemption from labor law preemption fails utterly to justify the MWRA's imposition of union agreements on private contractors. The plain language of the Act explicitly excludes public

entities from coverage under 8(e); the meager legislative history relied on by Petitioners fails to support their claims; settled law prior to 1959 actually prohibited such governmentally imposed requirements; and a private owner in MWRA's position could not engage in the conduct at issue under 8(e) in any event. For each of these reasons, the Petitioners cannot overcome the Act's existing prohibitions on governmentally mandated union agreements. The Court of Appeals decision must be upheld accordingly.

III. PUBLIC POLICY COMPELS ADHERENCE TO THE PRINCIPLES OF LABOR LAW PREEMPTION

Contrary to Petitioners' claims, the NLRA's preemption of the MWRA's union-only requirement is not at all "perverse" or "startling", but is in fact the only ruling which is consistent with settled public policy. Allowing governments to coerce collective bargaining agreements in the manner proposed by Petitioners would have severe adverse consequences both for the collective bargaining process and the competitive bidding process in this country.

It has been estimated that 40 percent of all construction work nationwide is government funded. To protect against waste and abuse, every state and the federal government have enacted laws which mandate that competitive bidding procedures be used, as discussed above at p. 28-30, so that work is performed by the lowest responsible bidder. The labor affiliation of contractors has been recognized as having no bearing on ability to perform the work.

By injecting union-only requirements into the bidding/award process, governments would deter from bidding a substantial percentage of contractors who do not wish to deal with labor unions, as has happened in this case.[18] Many

[18] The record evidence establishes that 75% of all construction work is normally performed on a non-union basis nationwide and 60% in Mas-

unionized contractors would also be deterred from bidding because of the unfair leverage which unions are granted during contract renewals covered by this type of Agreement.

The inevitable effect of imposing this arbitrary condition on the competitive bidding process is to increase costs. Not only does this cost inflation occur because unionized construction is more expensive generally,[19] but because limiting the number of bidders on public projects inevitably reduces the competitive incentive to lower bid prices.

In addition, a state-sponsored union-only requirement imposes numerous burdens on employees who do not wish to pay union dues or have union benefit plans substituted for those previously maintained by their employer on their behalf. Particularly minority and female employees who have in the past been denied entry to the industry due to union certification requirements would be adversely affected by government-sponsored forced unionism.

These facts highlight and confirm the reasons why this Court has long distinguished between governmental and private conduct in connection with the collective bargaining process. A private contractor who considers imposing union-only requirements on his subcontractors will be bound to consider market forces and the effect of increased costs on his overall competitiveness. A government agency has no such concerns and is subject instead to the political pressures of well-financed interest groups, such as labor unions.

The desire of government agencies for expedient responses to political influence has no place in the process of private sector

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sachusetts. (Jt. App. 54). Only 21% of all construction workers have chosen to be union members. (*Ibid.*).

[19] The record evidence reveals that the costs of union construction are 20% higher than non-union construction. (Jt. App. 55).

collective bargaining. As noted above, there are many other ways in which government can achieve its legitimate objective of timely completion of public works.[20] It is vital therefore, that this Court preserve and protect the "free zone" of collective bargaining from governmental interference.

CONCLUSION

For the reasons stated above, the Court of Appeals decision should be affirmed.

Respectfully submitted,

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[20] A government which is truly concerned about union disruption of construction schedules has many devices at its disposal which have proven to be effective. These include increased security, reserved gates, performance bonds and termination for non-performance.

Supreme Court, U.S.
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Nos. 91-261 and 91-274

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT,
Petitioner,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et al.*,
Respondents.

MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, INC.,
Petitioners,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF FOR PETITIONERS

1. In the lower courts, the Respondents Associated Builders and Contractors of Massachusetts/Rhode Island et al. ("Respondents" or "ABC") never claimed that any action of the Massachusetts Water Resources Authority ("MWRA" or "the Authority") constitutes, or causes, any unfair labor practice prohibited by the National Labor Relations Act ("NLRA"). Rather, throughout this litigation, Respondents' complaint has been that even though the NLRA does *not* expressly prohibit any aspect of what the MWRA has done, the Act, *by implication*, preempts the Authority from acting as it has regarding the project labor agreement covering MWRA's Boston Harbor Project.

It has also been a fixed point in this case that the project labor agreement between Petitioner Kaiser Engineers, Inc. ("Kaiser"), the construction manager for the Boston Harbor Project, and Petitioner Building and Construction Trades Council of the Metropolitan District ("BCTC" or "Trades Council") is a valid labor agreement of the kind contemplated by the construction industry proviso of NLRA § 8(e) and by NLRA § 8(f), 29 U.S.C. §§ 158(e) & (f).

The district court so concluded. *See* MWRA Pet. App. 76a-77a. The General Counsel of the NLRB—who, subsequent to the district court decision in this case rejected a challenge to the agreement by one of Respondents' amici—so concluded. *See* MWRA Pet. App. 88a-93a. And, the court of appeals majority, in turn, endorsed this conclusion:

> [U]nder the exceptions established by Sections 8(e) and (f) of the Act, the Master Labor Agreement between the Trades Council and Kaiser is a valid labor contract. That conclusion, however, is irrelevant to the preemption issue at hand. Appellants do not challenge the validity of that agreement; they contest the legality of Specification 13.1, which establishes recognition of the Trades Council and signing

> of the Master Labor Agreement as a condition of the award of an MWRA bid. [MWRA Pet. App. 24a (citations omitted).]

As this passage shows, what the MWRA has done is to declare, through its bid specification, that the Authority, as the owner of certain property that is being developed, will exercise its property rights to support the terms of a valid project labor agreement between the construction manager in charge of developing that property and a council of area construction unions. It is up to the Respondents to show that the Authority's action—though it violates no provision of the NLRA and exerts no pressure on any other entity to violate any such provision—is nonetheless in conflict with the Act's overall plan. This is a burden the Respondents have not carried.[1]

2. The court of appeals, though it based its holding on the preemption doctrine stated in *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), added that the preemption doctrine stated in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), is also "implicated." MWRA Pet. App. 15a. Until now, neither the court below, the Respondents, nor any amicus has explained that Delphic utterance.

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[1] Respondents repeat their argument made to the courts below that the project labor agreement before the Court is somehow infirm because the MWRA is not "an employer in the construction industry" and so cannot come within the construction industry proviso of NLRA § 8(e). Resp. Br. at 21-22. As we have pointed out in our principal brief, this argument is a red herring. *See* Brief for Petitioners ("Pet. Br.") at 26-30.

The MWRA does not claim to be an employer for purposes of NLRA §§ 8(e) and 8(f). But, in any case, this issue is academic, because both the Board and the courts below held the project labor agreement to be a valid agreement between a construction industry employer (Kaiser) and a council of unions representing construction employees (BCTC). As noted in the text, Respondents' claim has been that the Authority's support of this valid agreement is preempted, and, as we will show, the tortuous parsing of the language of the NLRA that is offered by Respondents regarding MWRA's status as an NLRA employer is completely irrelevant to this argument. *See* pp. 18-19, *infra*.

Amicus Association of General Contractors of America ("AGC") attempts an explanation that proceeds from a premise appearing in a number of the submissions on Respondents' behalf—whichever form of labor preemption is being argued. The claim is that MWRA's bid specification interferes with the right of workers to be free of "a union's power to organize the employees of private construction employers from the 'top down'" (AGC Br. at 12), and imposes on nonunion employers, as a condition of being awarded a contract or subcontract, the requirement that they surrender their right as employers "to refuse to recognize and bargain collectively with a union not designated by a majority of their employees or certified by the . . . [NLRB] after an election." (Brief *Amicus Curiae* of the National Right to Work Legal Defense Foundation Inc. at 8.) The premise of this claim is wrong and so is its conclusion.

The canonical form of the question before the Court in considering a claim of *Garmon* preemption has always been whether the state is purporting to regulate activity arguably protected by NLRA § 7 or arguably prohibited by NLRA § 8. *See* 359 U.S. at 244.[2]

The MWRA's bid specification is not regulation in the normal sense of that term at all, and MWRA does not even "purport to regulate" here. Nor does the bid specification *affect* activity protected by NLRA § 7 or prohibited by NLRA § 8. The protections of § 7 are specifically qualified by the construction industry proviso of § 8(e) and by § 8(f), which apply to, and are fully respected by, the project labor agreement. The prohibitions of § 8 are likewise tailored to conditions in the construction industry by these NLRA provisions, and the project agreement, in turn, is also tailored to comply with

[2] *Accord, Belknap v. Hale*, 463 U.S. 491, 498 (1983); *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 183 & n.4 (1978); *Farmer v. Carpenters*, 430 U.S. 290, 296 (1977); *Machinists, supra*, 427 U.S. at 138-139; *Linn v. Plant Guards*, 383 U.S. 53, 59-60 (1966).

these provisions. That is why the Board dismissed all charges of violation of the federal labor laws.

Respondents' and their amici's animadversions against union signatory and pre-hire agreements should arouse skepticism about the soundness of their arguments that follow. The Act's special legislative provisions for the construction industry represent Congress' principled solution to an important need. Special construction industry arrangements were made because Congress recognized that workers in that industry often do not establish a long-term relationship at a fixed site with either a particular employer or with each other, while they often retain a long-term relationship with a craft union that provides referral and representational services as the workers move among employers.

That being so, Congress judged that construction workers would often be deprived of the benefits of union representation and the protections of collective bargaining agreements—and the construction industry would be denied the benefits of labor relations stability—should union representation depend on employer-by-employer organizational activity followed by representation elections. Congress believed that the latter regime too often would leave construction workers without an adequate opportunity to select union representation and that this danger outweighs the risk that union signatory and pre-hire arrangements would impose union representation on unwilling workers. *See* Pet. Br. at 9-10, 11-15; *Jim McNeff v. Todd*, 461 U.S. 260, 266 (1983). In any event, Congress believed that an appropriate balance would be struck by allowing subsequent decertification elections if workers found themselves with an unwanted bargaining representative. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 664 (1982).[3]

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[3] A number of amici make something of the possibility that, although a subsequent vote by the employees of a particular employer may decertify the union as the bargaining agent for their bargaining unit, it would do so at the risk of jeopardizing the

Thus, the construction industry employee and employer interests that Respondents and their amici appeal to are not recognized by the NLRA as "rights" that trump the authority of a construction manager and construction unions to enter into a project labor agreement such as the one here. And the pressures on employer and employee interests generated by such an agreement, about which Respondents and their amici complain, are lawful pressures that Congress validated in the construction industry proviso of NLRA § 8(e) and in NLRA § 8(f). *See Woelke & Romero*, *supra*, 456 U.S. at 663 ("It is . . . true that secondary subcontracting agreements like these at issue here create top down organizing pressure. . . . Such pressure is implicit in the construction industry proviso. . . . Congress concluded that the community of interests on the construction jobsite justified the top-down organizational consequences that might attend the protection of legitimate collective bargaining objectives."). *See also Jim McNeff, Inc.*, *supra*, 461 U.S. at 270 & n.9.

Validation of the MWRA's bid specification—far from requiring the exemption "from this Court's settled principles of labor law preemption" that Respondents posit (Resp. Br. at 20)—requires only a straightforward ap-

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employees' and their employer's continuing employment on the project. *See, e.g.*, AGC Br. at 11. It is significant that, as far as we have been able to discover, there are no litigated cases disputing a contractor's right to remain on a project after such a decertification. Bid Specification 13.1, moreover, must certainly be read as calling for continuing compliance with the labor laws and may, therefore, fairly be read as excusing conformity with the project labor agreement insofar as compliance with its literal terms would no longer be lawful. That being so, there is no reason to assume that the MWRA would revoke the contract of the employer of such a decertifying unit. In any event, Respondents' complaint that a unit's decertification right insufficiently protects workers' options quarrels not with the terms of this agreement, nor with the MWRA's bid specification, but with the scheme enacted by Congress in NLRA §§ 8(e) and 8(f). This Court in *Woelke & Romero* made quite clear that this was indeed the balance struck by Congress and no complaint against that balance would be entertained. *See* 456 U.S. at 663.

plication of the policies Congress adopted in the NLRA's construction industry provisions. *See Woelke & Romero*, *supra*, 456 U.S. at 662-65. Accordingly, there is nothing at all to the argument that Bid Specification 13.1 somehow constitutes regulation interfering in any manner with conduct protected by NLRA § 7 or prohibited by NLRA § 8. The rights of construction industry employers and employees in this context are defined by the construction industry provisions of the Act. The project agreement between Kaiser and the BCTC fully embodies those rights, and the bid specification does nothing more than give the agreement full effect.

3. As to *Machinists* preemption, with which we treated extensively in our opening brief (Pet. Br. at 22-33, 35-36), only a few points need be added in the light of Respondents' contentions.

a. Respondents have, from the first, argued that, regardless of the impact that a private construction contractor's labor relations practices may have on the proprietary interests of a state agency seeking to develop its property, the agency may not "interfere" with those practices because the agency is the state. *See, e.g.*, Resp. Br. at 14-15, 18-19. But this argument proves far too much. The argument rests either on the wholly unworldly assumption that Congress believed state owner-developers making purchasing decisions on large construction projects are unaware of, and uninterested in, the possible labor relations problems that may arise on their construction sites, or on the even more far-fetched assumption that Congress somehow intended to require the state to expunge all such awareness and interest from consideration in making its construction purchasing decisions.[4]

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[4] Indeed, as we noted in our initial brief, the legislative history on this point is entirely to the contrary. Thus, a legislative memorandum circulated by Representatives Thompson and Udall—two sponsors of the provision that would become NLRA § 8(f)—noted that the contractual arrangements at issue had "been encouraged by the Atomic Energy Commission and other government agencies" with respect to construction of their own public works projects. 2

In the real world, state owner-developers—like private owner-developers—faced with proprietary concerns like those of the MWRA, form and express a preference for or against a project labor agreement. *See* note 4, *supra*. Nevertheless, according to Respondents, any action by a state owner to implement a favorable preference would constitute impermissible state coercion of construction industry employers and employees. Thus, the effect of Respondents' arguments would be to render illegal—on grounds of federal preemption—virtually all project labor agreements on state construction projects.[5]

NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, at 1578. And, the Senate Report supporting the original version of that provision had stated that validating such construction industry agreements served the interests of the United States, not only because the provision would promote "the general welfare," but also because it would promote the interests of the Government as an owner of property "directly concerned in the proper pricing and completion of [its] construction projects." S. Rep. 1509, 82d Cong., 2d Sess. 3 (1952). *See generally* Pet. Br. at 30-33 & n.15 (reviewing extensive evidence before Congress that the contractual arrangements at issue were widely used on public construction projects, and served the interests of public owner-developers).

[5] To be sure, amicus AGC questions the proposition that owner-developers in the private sector often influence the decision to seek a project labor agreement, albeit without offering any citations to back up its resistance to it. *See* AGC Br. at 25 & n.8. However, the fact of the matter is that private owner-developers often make the decision that a project labor agreement will govern their projects, and the owner's decision is based on the owner's determination as to where its economic interests lie and what arrangements should be made to protect and advance those interests. As we stated in our initial brief, this fact has been noted in a leading treatise on construction industry labor relations and in a United States Department of Labor study of the subject. See D.Q. Mills, *Industrial Relations and Manpower in Construction*, 40 (1972); U.S. Department of Labor, Labor Management Services Administration. *The Bargaining Structure in Construction: Problems and Prospects*, at 14 (1980). *See generally* Pet. Br. at 13-15. A variety of other sources are in accord. *See* M. Stokes, *Labor Law in Contractors' Language*, 195 (1980) ("owners often provide the driving force to negotiate a project agreement"); C. Bourdon & R. Levitt, *Union*

As we emphasized in our principal brief, the result urged by Respondents would, first of all, mandate that labor relations on public construction projects be controlled by a unique and artificial interplay of forces wholly unlike the interplay of forces on private construction projects. On Respondents' theory, the economic interests of the owner on a *public* project—and only on a public project—would be removed as a factor influencing the arrangements governing project labor relations. *See* Pet. Br. 24-26. Far from furthering the policies behind the *Machinists* labor preemption doctrine, such a result would undermine those policies. *See Machinists*, 427 U.S. at 140.

b. Respondents' arguments that the state cannot be involved in the labor relations decisions of the construction employers working on a public project, even when those decisions affect the state's proprietary interests, find no support in the decision on which the Respondents principally rely—*Wisconsin Dept. of Industry v. Gould*, 475 U.S. 282 (1986). In *Gould*, Wisconsin ran afoul of the *Garmon* doctrine because, for reasons wholly unrelated to any of its proprietary interests, Wisconsin acted to impose a blanket rule intended to supplement the sanctions imposed by the NLRA on employers who violate the unfair labor practice provisions of NLRA § 8. 475 U.S. at 287. The *Gould* Court did not suggest that the same result would follow when the state action raised no issue of *Garmon* preemption or arose in a context where the action was plainly motivated by proprietary concerns. It is thus critical that in this case, unlike *Gould*, the state decision was influenced by purchasing,

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and Open-Shop Construction, at 107-108 (1980) ("Industrial users [of construction] have . . . found project labor agreements helpful in the short term to construct their plants . . . at a lower cost than could be obtained under the existing labor agreements, and usually without the risk of strikes"); 2 Business Roundtable, *Coming to Grips With Some Major Problems in the Construction Industry: Special Building Trades Agreements*, 29-30, 32-39 (1978) (extensive discussion of role of owners in promoting project agreements).

not regulatory or policy concerns. *See generally* Pet. Br. 34-35.

c. Respondents and their amici contend that this distinction is too hard to draw and too easy to abuse, and hence too fragile to be followed. In so doing, Respondents and their amici take leave of *Gould* entirely. For that decision, rather than adopting or suggesting a *per se* rule of preemption, carefully limits its holding and rationale to situations in which the state's actions can fairly be characterized as proprietary only in form but regulatory in purpose. *See* 475 U.S. at 287-88, 289, 291. And, Respondents' argument for radically expanding *Gould* to all proprietary decisions does not withstand examination.

As the distinction between proprietary and regulatory action bears specifically on this case, we note that Respondents ignore the district court's finding that the MWRA's decision was, in fact, a proprietary decision, made on proprietary grounds. *See* MWRA Pet. App. 74a-75a. That finding is well supported:

(i) Kaiser—not the MWRA—first proposed the agreement, and did so because Kaiser believed, based on its experience as a private-sector project manager, that such an agreement would serve the interests of stability, efficiency, and expedition on the project.

(ii) There is no evidence in the record that the MWRA was moved to accept Kaiser's proposal as a result of union political pressure, or for any other reasons than those relating to the efficient construction and prompt completion of the project.

(iii) Indeed, as we have emphasized, the project agreement itself, and the bid specification supporting it, are narrowly tailored to affect only those labor relations issues directly relating to the Boston Harbor Project. *See* Pet. Br. at 25-26.[6]

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[6] The contention by Respondents and several of their amici (Resp. Br. at 354 n.20; AGC Br. at 13-14; Chamber of Comm. Br. at 24-25) that the MWRA might, as an alternative, have imposed penalty

More generally, this Court has recognized in a variety of contexts the proposition that government actions are subject to different legal standards when the government is acting as a manager or proprietor of its own resources and when the government is acting as a policy maker or regulator for the society generally. *See, e.g., International Society for Krishna Consciousness, Inc. v. Lee*, —— U.S. ——, 60 L.W. 4749, 4751 (1992); *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 453 (1988); *Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788, 805 (1985).

To be sure, decisions drawn from other areas of the law do not control the interpretation of a particular act of Congress, but these decisions do show that the distinction between the state acting as a proprietor and the state acting as a regulator is one that the Court believes can meaningfully be drawn. As the Court noted in the context of a commerce clause case:

> When a State buys or sells, it has the attributes of both a political entity and a private business. . . . While acknowledging that there may be limits on this sweepingly phrased principle, we cannot ignore the similarities of private businesses and public entities when they function in the marketplace. [*Reeves, Inc. v. Stake*, 447 U.S. 429, 439 n.12. (1980).]

The "similarit[y]" to "private businesses" in this case is the critical factor making this case qualitatively different from *Gould*.

4. Respondents and several of their amici (*e.g.*, Resp. Br. at 31-32; AGC Br. at 17-18) suggest, for the first time

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clauses to assure prompt contractor compliance with the court-imposed deadlines is inadequate. First, such an approach could well force MWRA to suffer the disruption and be satisfied only with the option of subsequently seeking adequate compensation, a process that would obviously be plagued with additional costs and uncertainties. Second, any penalty clause sufficient to assure compliance, even in the face of labor disruption, or to compensate the MWRA for all added costs and fines that such delays might entail, would surely be so onerous that no contractor would accept it.

in this Court, that had a private party done what the MWRA has done, that private party would run afoul of the prohibitions of the NLRA—in particular the ban against "hot cargo" agreements in § 8(e). The arrangement between Kaiser and the Trades Council, they imply, would violate § 8(e) if the MWRA were a private party, because of the MWRA's approval of that agreement and because of the Authority's support for the agreement in Bid Specification 13.1.

In essence, this is a late-blooming argument that a private owner-developer somehow violates NLRA § 8(e) if the private party (i) follows the labor relations advice of its construction manager by allowing the manager to negotiate a project labor agreement, (ii) retains the right to select project contractors, and (iii) utilizes that retained right to support the agreement, by requiring all of its contractors to adhere to the terms of the project agreement negotiated by the construction manager. But Respondents fail entirely to justify any such conclusion.

Respondents' new argument cannot be squared with the premise on which the case has been litigated until now, or with the conclusion of the Labor Board, the district court, and the court of appeals that the project labor agreement between Kaiser and the BCTC is a valid agreement under the construction industry proviso of NLRA § 8(e) and NLRA § 8(f). *See* pp. 1-2, *supra*. And, as we now show, the assertions by Respondents and their amici that the NLRA would prohibit a private owner from playing the role played here by MWRA in support of the project labor agreement are not justified by any of the relevant NLRA authorities.

a. In essence, Respondents' argument rests on the premise that, under the NLRA, the decision by an employer in the construction industry (in this case Kaiser) to conclude a project agreement must be made and carried through in a vacuum, wholly free from the influence of the owner's preferences and concerns relating to that decision and from the owner's assistance in implementing

that decision. No such requirement appears in the statute. Indeed, such a requirement would be quite unrealistic.

The participation of the Saturn Corporation—as owner-developer—in the project agreement concluded by Morrison-Knudsen that was described in our principal brief, and that was affirmed as lawful in an extensive NLRB Advice Memorandum, is representative of the wholly appropriate role that concerned owner-developers may play. *See* Pet. Br. at 15 & n.8, 28; *Morrison-Knudsen*, 13 NLRB Advice Mem. Rep. ¶ 23,061 (March 27, 1986), *reprinted at* BCTC Pet. App. 97a-102a (affirming the validity of the Saturn Corporation project labor agreement, which was challenged on the theory that, because of extensive ownership involvement, the construction manager was "not the real party of interest but "only . . . an agent of [the owner]").

Indeed, Saturn Corporation played a role with respect to the project labor agreement in that case which was at least as active as the role played by MWRA here. As the General Counsel explained, the owner, on its own and for its own proprietary reasons, "made the decision that the . . . facility would be constructed pursuant to a project agreement and [retained] the final authority as to which contractors will actually be awarded the project bids." BCTC Pet. App. 101a. On those facts, the NLRB General Counsel fully affirmed the validity of the agreement and the lawfulness of Saturn's conduct.[7]

[7] Amicus AGC, (AGC Br. at 25 n.8) seeks to distinguish *Morrison-Knudsen* by asserting that the owner-developer in that case was not itself charged with a violation of § 8(e). The assertion is not correct. An examination of the record in *Morrison-Knudsen* confirms that Saturn Corporation was charged with a violation of § 8(e)—*see* NLRB Case No. 26-CE-10—and that the Advice Memorandum recommended dismissal of this charge along with all others. *See* BCTC Pet. App. 97a (listing NLRB Case No. 26-CE-10 as one of the charges being dismissed pursuant to the Advice Memorandum); *see also* Appeal of the Regional Director's Refusal to Issue Complaint in NLRB Case Nos. 26-CA-11428, 11429, & 26-CE-8, 9, 10 & 12 (filed by Associated Builders and Contractors, Inc. on be-

As *Morrison-Knudsen* illustrates, the fact that an owner has retained the right to select contractors and uses the right to support a project labor agreement in no way calls into question the validity of the project agreement. Owner-developers have chosen to develop their property through two basic kinds of arrangements with construction industry employers. The owner may choose to use a "general contractor" (a construction industry specialist who takes responsibility for managing and supervising all the work and then contracts out some of it) or a "construction manager" (a similar specialist—indeed often the same firm as might operate as a general contractor—who manages and supervises the overall project and takes responsibility for specific work, but who does not have a right to select the contractors that do the balance of the work, that right being retained by the owner). Nothing in federal law requires owners to use general contractors rather than construction managers or vice versa, and nothing in federal labor law indicates that Congress had any care as to which of these arrangements an owner might choose.

b. Respondents proceed by ignoring most of the relevant authorities on the law and practice of owner-developer involvement in construction industry project labor agreements. Such authority as there is in this regard—with

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half of charging parties, May 12, 1986), at 3 ("On December 12, 1985 . . . charges were filed against Saturn Corporation . . . , Morrison-Knudsen, Inc., . . . , and the Building and Construction Trades Department, AFL-CIO.").

Respondents' efforts to distinguish *Morrison-Knudsen* are equally unavailing. Respondents simply assert, without explanation or citation, that the owner in that case "was not a 'party in interest in the agreement'" and that "no action by the owner was required to implement the agreement." Resp. Br. 32. These assertions are beyond understanding given that, in *Morrison-Knudsen*, Saturn had, on its own, decided that there should be a project labor agreement, instructed its construction manager to negotiate one, and retained the right to select all jobsite contractors. BCTC Pet. App. 101a. Moreover, Morrison-Knudsen had expressly described itself as "acting as the agent of Saturn in administering construction activities at the site." *Id.* at 97a.

the possible exception of one court of appeals decision favorable to us—comes from NLRB proceedings.

For almost thirty years, the Board has held that the construction industry proviso of NLRA § 8(e) validates agreements entered into by a construction industry employer and union, even when the effectiveness of the agreement requires the employer to obtain the cooperation of the project's owner, or some other employer, who has retained control of the selection of contractors. *See Local 217, United Association (Carvel Co.)*, 152 NLRB 1672 (1965). And, on this basis, it is clear that construction managers, no less than general contractors, negotiate § 8(e) construction industry agreements under the NLRA system, even though it is the owner who selects contractors. *See Southern California Conference of Carpenters (Contractor Negotiating Committee)*, Advice Memorandum, Case Nos. 21-CB-8543 & 21-C-1765 (Oct. 31, 1983), *reprinted* at 29 Construction Labor Report 1275, 1278 (Nov. 6, 1983) (holding such agreements by construction managers to be fully valid); *see also Morrison-Knudsen*, *supra*. The construction manager-employer who signs such an agreement, the Board reasons, is taking on an obligation to furnish the jobsite conditions called for in the agreement, and this may require that he obtain cooperation from the owner, or from some other employer, who has retained the right to control contractor selection on the jobsite. *Carvel Co.*, *supra*; *Contractor Negotiating Committee*, *supra*.

Moreover, under the NLRB decisions, an owner who retains the right to select all contractors and subcontractors on a construction site, and thereby exerts significant control over jobsite labor relations, may on that basis be considered "an employer in the construction industry." *See United Brotherhood of Carpenters (Longs Drug Stores)*, 278 NLRB 440 (1986); *Los Angeles Building Trades Council (Church's Fried Chicken)*, 183 NLRB 1032 (1970); *see also A.L. Adams Constr. Co. v. Georgia Power Co.*, 733 F.2d 853 (11th Cir. 1984), *cert. denied*, 471 U.S. 1075 (1989). Indeed, as the Board makes clear

in *Longs Drug Stores*—a case which involved an owner who primarily operated a chain of retail stores—this is so precisely because one of Congress' goals in passing the construction industry proviso of NLRA § 8(e) was to validate agreements governing overall jobsite labor relations.[8]

c. Amicus AGC (at pp. 18-20), and to a lesser extent Respondents (at pp. 31-33), urge *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616 (1975), in their effort to establish the unlawfulness of MWRA's actions here. *Connell* has no bearing on this case.

In *Connell*, the Court found a particular construction industry agreement to be unprotected by the construction industry proviso to NLRA § 8(e) because the agreement was not negotiated in "the context of collective bar-

[8] The Board reasoned:

> [W]hether an employer not primarily in the construction business may be deemed to be an employer in the construction industry for purposes of the first proviso to Section 8(e) is dependent on the degree of control over the construction-site labor relations it elects to retain. As its own general contractor, an employer retains absolute control. Thus, as stated in *Church's Fried Chicken*, *supra*, quoting from the legislative history of the proviso (2 Leg. Hist. 1425(1) (NLRA 1959):
>
> > The case of the building and construction industry represented probably the most flagrant injustice, where a general contractor is, in effect, entirely in control of the kind of labor relations taking place on a jobsite which he runs. He lets subcontracts based upon price, responsibility, and the ability to handle labor relations.
> >
> > He lets those contracts, very well knowing the kind of labor relations which may exist within any of the subcontractor companies . . . He is not innocent of any unfair labor policies on the part of a subcontractor.
>
> Similarly, in situations where an employer hires a general contractor, but nonetheless regularly makes decisions, including the selection of subcontractors, normally within the scope of a general contractor's duties and authority, it would appear that the employer retaining such authority is tantamount to a general contractor. And this reasoning would appear to hold true regardless of whether the employer is the owner of the premises under construction or a prospective lessee. [272 NLRB at 442.]

gaining relationships," 421 U.S. at 633, and was not an effort to solve the problems of friction caused by having union represented subcontractors "employed alongside nonunion subcontractors" on the same jobsite, *id.* at 631.[9] The *Connell* Court explained that agreements failing to satisfy *either* of these tests—even if within the literal wording of the § 8(e) construction industry proviso—are outside of its protection, because outside of Congress's purposes in passing the proviso:

> [W]e think [the proviso's] authorization extends only to agreements in the context of collective bargaining relationships and, in light of congressional references to the *Denver Building Trades* problem [referring to the issue of jobsite friction between the employees of union and nonunion contractors on a single jobsite, *see NLRB v. Denver Building Trades*, 341 U.S. 675 (1951)], possibly to common-situs relationships on particular jobsites as well. [421 U.S. at 633; *see also id.* at 628-31.]

The project labor agreement here meets *both* of these tests. The agreement was adopted by Kaiser "in the context of collective bargaining," and one of its purposes is to avoid problems of jobsite friction by governing "common situs relationships on [a] particular jobsite[]."

Thus, Respondents' reliance on *Connell* must be understood as another effort to call into question whether federal law allows an owner-developer to support, for fully appropriate proprietary reasons, a project labor agreement consumated by its general contractor or construction manager that conforms in all respects to the conditions and requirements of federal law.[10] The answer

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[9] The agreement in *Connell* was an agreement between a single craft union local and a general contractor employing no members of the union's craft. The agreement required that, on any project undertaken by the general contractor, all work in this craft be contracted to employers who had previously entered agreements with the union local, regardless of whether, on any given site, other contractors employing other crafts would be unionized. 421 U.S. at 619-621, 631.

[10] To be sure, Respondents and their amici contend that even if Kaiser and the Trades Council could be parties to a valid agreement,

to that question is not supplied by *Connell*—indeed *Connell* has no bearing on it. The answer, under *Morrison-Knudsen Co. Inc.*, 13 NLRB Advice Mem. Rep. ¶ 23,051 (March 27, 1986) and generally applicable principles of federal law, is that the owner-developer may properly take such action. *See* pp. 11-15 and nn. 7, 8 & 10, *supra*.[11]

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the agreement here is invalid because it must be treated as if it were an agreement between the MWRA and the Trades Council. *Connell* certainly provides no authority for overriding the conclusion of the Board and the court below on this score. *See* note 9, *supra*. And, as we have shown, the relevant NLRA authority is contrary to the Respondents' position. *See* pp. 11-15 and nn. 7 & 8, *supra* (discussing *Morrison-Knudsen*, *supra*; *Carrel Co.*, *supra*; and *Contractor Negotiating Committee*, *supra*). *See also Baltimore Building Trades Council (Whiting-Turner Contracting)*, 7 NLRB Advice Mem. Rep. ¶ 17,167, at n.6 (May 30, 1980) (where both owner and construction contractor signed agreement, General Counsel would not analyze validity of agreement in terms of owner's status because owner "entered into this contract only because of its association with [the construction contractor] on this site").

A number of the amici find support for their mischaracterization of this arrangement in a statement printed on the cover of some copies of the master agreement between Kaiser and the BCTC listing "Kaiser Engineers, Inc. on behalf of the Massachusetts Water Resources Authority." MWRA App. at 107a. This phrase, which refers accurately to the fact that Kaiser was acting as MWRA's project manager and entered into the project agreement in that capacity, hardly can be invoked to expunge the fact that the agreement was with Kaiser as a principal. In any event, a single remark on the cover of a document that was not raised until this late date in this litigation cannot be made to contradict the litigated factual record, the parties' understanding of the agreement, and the findings of two courts about the nature of the contractual relations contained in the document. *Cf. Whiting-Turner Contracting*, *supra*.

[11] Respondents and amicus AGC offer string cites of unexplained authorities in an effort to demonstrate that such an owner-developer role is illegitimate. Respondents' Brief at 31; AGC at 17-18. The irrelevance of these cases to the issues here highlights the unsoundness of their arguments.

Several of these authorities simply draw the boundary line between the construction industry and other industries: *Local 1149, United Brotherhood of Carpenters (American President Lines, Ltd.)*, 221 NLRB 456 (1975), *enf'd.*, 81 Lab. Cas (CCH) ¶ 13,

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We conclude by emphasizing that this is a *preemption case*. To be sure, the Respondents' diversionary disputations on possible issues regarding private owner-developers and the law of NLRA § 8(e) grow out of an analogy we first offered. But in seeking to refute our

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137 (D.C. Cir. 1977) (repair and maintenance of cargo containers not a construction industry activity); *Forest City/Dillon-Tecon Pac.* 209 NLRB 867 (1974), *enf'd in part*, 522 F.2d 1107 (9th Cir. 1975) (factory manufacture of preassembled elements to be incorporated later in construction is not itself a construction industry activity); *NLRB v. W.L. Rives Co.*, 328 F.2d 464 (5th Cir. 1964) (same); *Local 1937, Painters & Glaziers Dist. Council No. 5 (Prince George's Center, Inc.)*, 183 NLRB 37 (1970) (building repainting and maintenance not construction industry); *Frick Co.*, 141 NLRB 1204 (1963) (manufacturer of refrigeration equipment is not a construction industry employer even if a small portion of its business is the installation of the equipment). Of course there is not the least question that the activity in issue here—the construction of a massive system of waste treatment facilities—is construction.

Another authority, *A.L. Adams Constr. Co. v. Georgia Power Co.* 733 F.2d 853 (11th Cir. 1984), *cert. denied*, 471 U.S. 1075 (1989), held that a power company, in the position of an owner-developer, *is* an employer in the construction industry when the company undertakes to act as its own general contractor, even though the bulk of its employees are not in the construction industry. *See id.* at 856-58. Thus, as we have noted (*see* page 11, *supra*), *A.L. Adams* supports our position in this case.

Of particular interest is the difference between this case and *Columbus Bldg. & Constr. Trades Council (Kroger Co.)*, 149 NLRB 1224 (1964), which has been cited for the proposition that owners may not seek to influence project labor agreements. *See* Resp. Br. at 31. *Kroger* involved the issue of whether a potential lessee of a construction site, the Kroger Company, might be considered a construction industry employer. As the Board explained in *Longs Drug Stores, supra*, its holding that the lessee was not such an employer was based on the fact that Kroger—unlike MWRA and similarly-situated private owners—was an employer not primarily in the construction industry, *who did not retain any significant role with respect to labor relations on the project. See Longs Drug Stores, supra*, 272 NLRB at 442-43 (quoted at note 8, *supra*). The case in no way held that Kroger *could not* retain such a role. *Id.*

analogy by raising hypothetical and hypertechnical arguments that find no support in the established law, Respondents and their amici ignore the point of decision in this case and the way in which our analogy illuminates that point.

Where a judicial proceeding, such as this case, rests on a claim of implied preemption, grounded on the *Machinists* doctrine, the central issue must be whether the action of the state agency is in some way inconsistent with the federal statute or its underlying structure and purposes. As we have shown many times over, there is no inconsistency here with any explicit term of the NLRA. Thus, any analogy can do no more than illuminate whether MWRA's bid specification is inconsistent with the purposes and structure of the Act. And, none of Respondents' arguments can obscure the critical point that, *in substance*, MWRA has sought nothing more than to accomplish what the Act allows private contractors and owner-developers to accomplish.

The NLRA § 8(e) arguments raised against us—each of which focuses on particular aspects of *the form* of this transaction, and each of which we have refuted—do not challenge this fundamental point. The law of preemption is not concerned with such formalisms, but rather with whether *the substance* of the relationship conflicts with the letter or the policies of federal labor law.

If Respondents are attempting to argue more broadly —and draw the Court into ruling—that even formal changes could not save this arrangement because an owner-developer may never, under the NLRA, seek to influence the labor relations arrangements on its construction projects (regardless of the proprietary interests it has at stake), then Respondents' contention is indeed substantive, and radically so: it is also unprecedented, unreasonable and unwarranted.[12]

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[12] Respondents and their amici (Resp. Br. at 20 n.9; AGC Br. at 15-16) contend that the Solicitor General has "conceded" that a

CONCLUSION

For the reasons stated above, and in our initial brief, the decision of the First Circuit should be reversed.

Respectfully submitted,

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---

state bid specification implementing an agreement not valid under the national labor laws might well be preempted. We fail to see how this "concession" advances Respondents' case. If the project agreement between Kaiser and the BCTC required, for instance, that anyone employed on the project must be a full union member (rather than merely accept the financial "agency" relation described in *NLRB v. General Motors*, 373 U.S. 734 (1963)), then any attempt to enforce such a term would constitute an unfair labor practice, and a state bid specification to the contrary would not shield the employer or union from that result. A state might even be enjoined from taking action against an employer-contractor who refused to enforce such an invalid provision. But this analysis only lends emphasis to the point that in this case, the agreement and all of its provisions have been found to comply fully with the NLRA.

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On Writs of Certiorari to the United States Court of Appeals for the First Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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Nos. 91-261 and 91-274

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

Respondents Associated Builders & Contractors, of Massachusetts/Rhode Island, Inc., *et al*, pursuant to Supreme Court Rule 25.5, hereby file a supplemental brief for the purpose of bringing to the Court's attention a recently enacted Executive Order of the President of the United States, Executive Order No. 12,818, 57 Fed. Reg. 48,713 (1992), which is reproduced in Respondent's Appendix at A4-A7. This Executive Order, though directed only to federal agencies, plainly contradicts one of the central contentions of the Petitioners and the Solicitor General as amicus in this case, *i.e.*, that governmentally imposed

union-only project agreements "further substantial public purposes." *See* Sol. Gen. Brief at 29; Pet. Brief at 36.

Specifically, the Executive Order prohibits federal agencies from imposing union agreements on any private contractor. The Order further prohibits federal agencies from allowing such agreements to be imposed on private contractors performing work on government projects. The explanatory statement accompanying the Executive Order, which is set forth in the Appendix at A1-A3, contains the following expressions of policy which are pertinent to this case:

> The presence of competition from open shop contractors has consistently operated to drive down costs of taxpayer-financed Government construction projects. Logically, increased competition results in reduced costs. Even where the wage rates for union and nonunion workers alike are set by the Davis-Bacon Act, open shop contractors are free from the restrictive work rules and practices imposed by a collective bargaining agreement that hinder productivity and drive up costs. Open shop contractors are able to use unskilled and semiskilled workers for certain tasks, rather than being required to use a higher paid craftsman, and open shop contractors are also able to use skilled workers for a variety of tasks; by contrast, union employees are often prevented by union jurisdictional lines from performing tasks for which they are clearly skilled.
>
> Project agreements that require open shop contractors to adhere to the provisions of a collective bargaining agreement effectively eliminate the competitive advantages noted above.
>
> * * *

Although the extent of the use of discriminatory project agreements is unknown, where they do exist they tend to drive up labor costs substantially.

* * *

The Executive order is consistent with longstanding Federal procurement regulations that seek to preserve maximum competition on public works.

Respectfully submitted,

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APPENDIX

A1

THE WHITE HOUSE

Office of the Press Secretary
(Miami, Florida)

For Immediate Release October 23, 1992

Executive Order to Promote Open Bidding on Federal and Federally Funded Construction Projects

FACT SHEET

The President signed an Executive order today to promote open bidding on Federal construction projects by precluding the use of agreements between Federal contractors and labor organizations that deny opportunities to open shop employers or otherwise discriminate against nonunion workers. The Executive order is expected to reduce significantly costs on Federal construction projects as well as expand employment opportunities, especially for small businesses.

The order targets provisions of project agreements reached between a construction company and a labor organization, with or without agency approval, that discriminate against open shop contractors and their employees in one or more ways. Some agreements explicitly preclude open shop contractors from bidding on subcontracts. Other agreements operate in practice to the same effect by requiring the open shop contractor to agree to, in addition to a wage and benefits package, costly work rules and practices provided for in the collective bargaining agreement or in the project agreement itself. Still other agreements require nonunion workers of open shop contractors to join the union as a condition of working on the job; in violation of worker rights recognized by Supreme Court decisions.

The presence of competition from open shop contractors has consistently operated to drive down costs of taxpayer-financed Government construction projects. Logically, increased competition results in reduced costs. Even where the

wage rates for union and nonunion workers alike are set by the Davis-Bacon Act, open shop contractors are free from the restrictive work rules and practices imposed by a collective bargaining agreement that hinder productivity and drive up costs. Open shop contractors are able to use unskilled and semiskilled workers for certain tasks, rather than being required to use a higher paid craftsman, and open shop contractors are also able to use skilled workers for a variety of tasks; by contrast, union employees are often prevented by union jurisdictional lines from performing tasks for which they are clearly skilled.

Project agreements that require open shop contractors to adhere to the provisions of a collective bargaining agreement effectively eliminate the competitive advantage noted above.

Cost savings on Federal projects are expected to be significant. The Federal FY 1993 budget for construction includes nearly $21 billion in direct Federal programs and over $29 billion in Federal grants. Although the extent of the use of discriminatory project agreements is unknown, where they do exist they tend to drive up labor costs substantially. A 1991 GAO study of a project agreement for the construction of a Department of Energy facility fount that average wage rate on the project exceeded the average Davis-Bacon wage rate by an additional 21 percent. Other recent studies report even greater labor cost differentials.

Nothing in the Executive order prevents contractors or their employees from voluntarily seeking union representation nor should the Executive order be read to discourage union contractors in any way from bidding on Federal projects. The Executive order merely prohibits any agency, contractor or construction manager from imposing a union-only requirement on any other contractor or subcontractor seeking to perform Federal work. The Executive order is consistent with longstanding Federal procurement regulations that seek to preserve maximum competition on public works. Accordingly, the Executive order

directs executive agencies not to award a contract for the construction of a Federal project unless it ensures that the contractor will not impose any discriminatory provision on any subcontractor as a condition of the award of the subcontract.

The Executive order also directs executive agencies to examine their grant-making authority within 30 days and to exercise any such authority to condition the award of a Federal grant for construction on the grantee's agreement to comply with the nondiscrimination provisions of the Executive order.

The order is effective in 30 days.

THE WHITE HOUSE

Office of the Press Secretary
(Miami, Florida)

For Immediate Release October 23, 1992

EXECUTIVE ORDER

- - - - - - -

OPEN BIDDING ON FEDERAL AND FEDERALLY FUNDED CONSTRUCTION PROJECTS

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 471 *et seq.*, in order to (1) promote and ensure open bidding on Federal and federally funded construction projects; (2) increase competition in Federal construction contracts and contracts under Federal grants or cooperative agreements; (3) reduce construction costs; (4) expand job opportunities, especially for small businesses; and (5) uphold the associational rights of workers freely to select, or refrain from selecting, bargaining representatives and to decide whether or not to be union members, so as to provide access to employment opportunities on Federal and federally funded construction projects for all workers; thereby promoting the economical and efficient administration and completion of Federal and federally funded construction projects, it is hereby ordered as follows:

Section 1. (a) To the extent permitted by law, before any executive agency may award any construction contract after the effective date of this order, or obligate funds pursuant to such contract, it shall ensure that neither the agency's bid specifications, project agreements, nor other controlling documents, nor those of any contractor or construction manager, shall:

(1) Require bidders, offerors, contractors or subcontractors to enter into or adhere to agreements with one or more labor organizations, on the same or other related construction project(s), or

(2) Otherwise discriminate against bidders, offerors, contractors or subcontractors for refusing to become or remain signatories or otherwise adhere to agreements with one or more labor organizations, on the same or other related construction project(s), or

(3) Require any bidder, offeror, contractor or subcontractor to enter into, adhere to, or enforce any agreement that requires its employees, as a condition of employment, to:

(i) become members of or affiliated with a labor organization; or

(ii) pay dues or fees to a labor organization, over an employee's objection, in excess of the employee's share of labor organization costs relating to collective bargaining, contract administration, or grievance adjustment.

(b) No contractor, and no subcontractor under a Federal contract, shall require, as a condition of any subcontract relating to a Government construction contract, that the party with which it contracts impose or enforce any of the elements specified in section 1(a) (1)-(3) above in performing its subcontract. This section does not prohibit a contractor or subcontractor from voluntarily entering into an otherwise lawful agreement with a labor organization regarding its own employees.

(c) Contracts awarded before the effective date of this order, and subcontracts awarded pursuant to such contracts, whenever awarded, shall not be governed by this order.

Sec. 2. (a) The heads of executive agencies shall, within 30 days of the date of issuance of this order, review all statutes

under their jurisdiction that provide authority to issue grants or enter into cooperative agreements for construction projects and identify any statute that provides authority to condition a grant award or cooperative agreement on the recipient's or party's agreement that neither bid specifications, project agreements, nor other controlling documents pertaining to the grant or cooperative agreement contain any of the elements specified in section 1(a) (1)-(3), above.

(b) The heads of executive agencies shall exercise any authority identified pursuant to section 2(a), to the extent consistent with law, so as to preclude the grant recipient or party to a cooperative agreement from imposing any of the elements specified in section 1(a) (1)-(3) above in connection with any such grant or cooperative agreement, awarded or entered into after the date of such exercise.

Sec. 3. (a) In the event that a Federal contractor or construction manager does not perform in accordance with section 1 above, the executive agency shall take such action as may be appropriate, as determined by the agency, consistent with law or regulation, including, but not limited to, debarment, suspension, termination for default, or withholding of payments.

(b) In the event that a recipient of a Federal grant or party to a cooperative agreement does not perform in accordance with section 2(b) above, the executive agency that awarded the grant shall take such action, as determined by the agency, consistent with law or regulation, as may be appropriate.

Sec. 4. (a) The head of an executive agency may exempt a particular project, contract, subcontract, grant, or cooperative agreement from the requirements of any or all of the provisions of sections 1 and 2 of this order, if the agency head finds that special circumstances require an exemption in order to avert an imminent threat to public health or safety or to serve the national security.

(b) A finding of "special circumstances" under section 4(a) may not be based on the possibility of, or an actual labor dispute concerning the use of:

(1) contractors or subcontractors who are non-signatories to, or otherwise do not adhere to, agreements with one or more labor organizations, or

(2) employees on the project who are not members of or affiliated with a labor organization.

Sec. 5. (a) "Construction contract" as used in this order means any contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property.

(b) "Executive agency" as used in this order shall have the same meaning it has in 5 U.S.C. 105.

(c) "Labor organization" as used in this order shall have the same meaning it has in 42 U.S.C. 2000e(d).

Sec. 6. Within 30 days of the issuance of this order, the Federal Acquisition Regulatory Council shall take whatever action is required to amend the Federal Acquisition Regulation in order to implement the provisions of this order.

Sec. 7. This order is not intended to create any right or benefit, substantive or procedural, enforceable by a nonfederal party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Sec. 8. This order shall become effective 30 days after the date of this order.

GEORGE BUSH

THE WHITE HOUSE,
October 23, 1992.

NOV 27 1992

Nos. 91-861 and 91-874

In the Supreme Court of the United States

OCTOBER TERM, 1992

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, PETITIONER

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, INC., PETITIONERS

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION OF THE UNITED STATES FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

AND

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-261

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, PETITIONER

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

No. 91-274

MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, INC., PETITIONERS

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION OF THE UNITED STATES FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AS AMICUS CURIAE SUPPORTING PETITIONERS

The Solicitor General, on behalf of the United States as amicus curiae, respectfully moves for leave

to file the attached supplemental brief discussing the effect on this case of Executive Order No. 12,818, which was issued by the President on October 23, 1992. See 57 Fed. Reg. 48,713 (1992).

This case presents the question whether the doctrine of implied preemption under the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, prohibits a state agency, acting in its proprietary capacity, from implementing an agreement that requires all contractors performing work on a construction project undertaken by the agency to adhere to a collective bargaining agreement that establishes labor terms and union recognition for the project as a whole. Executive Order No. 12,818 addresses the use of such project labor agreements in connection with construction contracts awarded by federal agencies, and with non-federal construction projects that are funded by federal grants and cooperative agreements. The Boston Harbor clean-up project at issue in this case receives federal financial assistance from the Environmental Protection Agency pursuant to Titles II and VI of the Federal Water Pollution Control Act (the Clean Water Act), 33 U.S.C. 1281 *et seq.* and 1381 *et seq.* We request leave to file the attached supplemental brief to inform the Court of the United States' position regarding the effect of the Executive Order on the Boston Harbor project.

Respectfully submitted.

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Solicitor General

JERRY M. HUNTER
General Counsel
National Labor Relations Board

NOVEMBER 1992

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The United States files this supplemental brief to discuss Executive Order No. 12,818, which was issued

by the President on October 23, 1992. See 57 Fed. Reg. 48,713 (1992).

This case presents the question whether the doctrine of implied preemption under the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, prohibits a state agency, acting in a proprietary capacity, from implementing an agreement that requires all contractors performing work on a construction project undertaken by the agency to adhere to a collective bargaining agreement that establishes labor terms and union recognition for the project as a whole. Executive Order No. 12,818 addresses the use of such project labor agreements in connection with construction contracts awarded by federal agencies and construction contracts funded by federal grants and cooperative agreements.

1. Section 1(a) of Executive Order No. 12,818 provides that, to the extent permitted by law, before any federal agency may award a construction contract, it must ensure that the bid specifications, project agreements and other controlling documents of the agency and its contractors and construction managers do not, *inter alia*, require bidders, contractors or subcontractors to enter into or adhere to agreements with one or more labor organizations on the same construction project or any other project. Section 1(a) also provides that the agency may not require any bidder, contractor or subcontractor to enter into, adhere to, or enforce an agreement that requires its employees, as a condition of employment, to become members of or affiliated with a labor organization.

Section 2(a) of the Executive Order directs the heads of executive agencies, within 30 days of the issuance of the Order (*i.e.*, by November 22, 1992), to identify statutes under their jurisdiction that provide authority to condition a grant award or cooperative agreement on the recipient's or non-federal party's agreement that the bid specifications, project agreements, and other controlling documents pertaining to the grant or cooperative agreement will not contain any of the elements that Section 1(a) does not permit on federal construction projects. Section 2(b) then directs the agency heads to exercise any statutory authority they have identified, to the extent consistent with law, so as to preclude the grant recipient or party to a cooperative agreement from imposing any of those elements. However, the latter directive applies only prospectively—to grants awarded or cooperative agreements entered into after the date the agency has exercised the identified statutory authority to impose the conditions.

2. The Boston Harbor clean-up project has received federal financial assistance from the Environmental Protection Agency (EPA) pursuant to Titles II and VI of the Federal Water Pollution Control Act (the Clean Water Act), 33 U.S.C. 1281 *et seq.* (grants for construction or treatment works), 1381 *et seq.* (state water pollution control revolving funds). For example, in the appropriations act for EPA for fiscal year 1993, Congress expressly appropriated $100 million for grants for the Boston Harbor project pursuant to Title II of the Clean Water Act.[1]

---

[1] Congress appropriated a total of $305,500,000 "for making grants under title II of the Federal Water Pollution Control

We have been informed by EPA that it has determined that the Clean Water Act permits it to condition grants or cooperative agreements on the recipient's or non-federal party's acceptance of the limitations specified in Section 1(a) of Executive Order No. 12,818. Nevertheless, it appears that the Executive Order will not have any impact on the Boston Harbor project at this time. Under Section 2(b), the Executive Order's restrictions do not apply to grants made prior to the time the agency head has identified the agency's statutory grant authorities that permit it to impose the specified conditions. As a result, any grants made to the Massachusetts Water Resources Authority (MWRA) during fiscal year 1992 or in prior years are unaffected by the Executive Order.

Act * * * to the appropriate instrumentality for the purpose of constructing secondary sewage treatment facilities to serve the following localities, and in the amounts indicated: Boston, Massachusetts, $100,000,000; * * * ." Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1993, Pub. L. No. 102-389, Tit. III, 106 Stat. 1599-1600. For fiscal year 1992, Congress likewise appropriated $100 million specifically for the Boston Harbor project. Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1992, Pub. L. No. 102-139, Tit. III, 105 Stat. 764. In addition, EPA has informed us that from 1991 to the present, it has made State Revolving Fund (SRF) loans for the Boston Harbor project totalling $73.2 million, and that it anticipates making new SRF loans totalling $100 million during fiscal year 1993.

On the other hand, any *new* grants made by EPA to MWRA from this time forward—including the $100 million specified in the 1993 appropriations act—will be subject to the Executive Order.[2] However, Section 1(c) of the Order states that "[c]ontracts awarded before the effective date of this order [October 23, 1992], and subcontracts awarded pursuant to such contracts, whenever awarded, shall not be governed by this order." By virtue of this provision, any contracts awarded by MWRA prior to October 23, 1992 (and any subcontracts, whenever awarded, under such contracts) will be unaffected by the Executive Order, even if work performed under those contracts or subcontracts is funded by future grants made by EPA to MWRA. We understand that MWRA has entered into a number of long-term contracts that are covered by this grandfather provision. See Pet. Supp. Br. 4. If MWRA allocates to those existing contracts and subcontracts the $100 million it will receive pursuant to the 1993 appropriations act, the conditions in Executive Order No. 12,818 will not be triggered. EPA has no obligation to make similar

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[2] EPA's regulations, which are similar to those of other granting agencies, provide that "[w]hen procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds." 40 C.F.R. 31.36(a). However, the regulations further provide that "[t]he State will ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations." *Ibid.* We have been informed by EPA that by virtue of the latter provision, no amendment of its regulations is necessary for EPA to give effect to Executive Order No. 12,818 in connection with grants it awards.

grants to MWRA after fiscal year 1993. But if it does, the Executive Order's restrictions will be triggered only if (and to the extent) the funds are applied to work under contracts awarded on or after October 23, 1992.

For the foregoing reason, we agree with petitioners (Pet. Supp. Br. 4) that Executive Order No. 12,818 does not have any immediate impact on the Boston Harbor project, and the nature of any such impact it may have in the future is speculative. Respondents, in their supplemental brief, do not contend otherwise.

3. Respondents do assert, however, that the Executive Order contradicts one of the "central contentions" in our amicus brief—which, according to respondents, is that "governmentally imposed union-only project agreements 'further substantial public purposes.' " Resp. Supp. Br. 1-2 (quoting U.S. Amicus Br. 29). Respondents' quotation of our submission is selective. The section of our brief to which they refer discusses the numerous public construction projects on which project labor agreements have been used in the past. The sentence on which respondents rely then states: "Governmental agencies responsible for these projects, and the private contractors who perform the work, have formed the judgment that such agreements may sometimes help to ensure labor peace and stability, an available labor supply, and timely completion of major construction projects that further substantial public purposes." U.S. Amicus Br. 29. The point of the quoted clause was that the projects mentioned "further substantial public purposes." We did not argue that project labor agreements invariably further substantial public purposes,

as respondents' selective quotation implies. On that issue, we made the more limited point that governmental agencies and private contractors have concluded that such agreements "sometimes help" to ensure labor peace and stability, an available labor supply, and timely completion of the projects.

Executive Order No. 12,818 has no effect on our legal submission in this case. The National Labor Relations Act does not preempt state and local governments from choosing to utilize project labor agreements on their construction projects to advance legitimate proprietary concerns. MWRA therefore was free under that Act to decide whether the perceived advantages of a project labor agreement outweighed the disadvantages of such an agreement. It is irrelevant whether another governmental entity might have reached a different conclusion.

For the foregoing reasons and those stated in our principal brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

KENNETH W. STARR
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NOVEMBER 1992

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Nos. 91-261 and 91-274

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-261

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, PETITIONER

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL., RESPONDENTS

No. 91-274

MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, INC., PETITIONERS

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL., RESPONDENTS

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Respondents, in a supplemental submission, "bring[] to this Court's attention" Executive Order 12,818 (October 23, 1992) and offer an excerpt from the "Fact Sheet" issued by the White House Office of the Press Secretary

that accompanied the Executive Order to "contradict" Petitioners' and the Solicitor General's contention that "union only project agreements 'further substantial public purposes.'" Resp. Supp. Br., 1-2.

There is no contradiction between the Executive Order or the press statement and our prior submissions; there is, however, a contradiction between the Executive Order and Respondents' legal position in this case; aside from this the Executive Order has no direct relevance for present purposes.

1. Petitioners have never asserted, and do not assert now, that project agreements *always* produce economic benefits to construction industry employers and to property owner-developers. We have argued only that under certain circumstances project agreements may reasonably be thought to produce such benefits and that the national labor laws clearly leave open the option to contractors and owners to reach, and to act on, that proposition. We have cited ample evidence, some of it from federal sources, that such economic benefits exist. *See* BCTC Pet. 9-12; Pet. Br. 13-14, 31-32 & n.15; Pet. Reply Br. 6-7 & nn. 4 & 5. *See also* U.S. Br. on Pet. 13-14; U.S. Br. 24-29 & nn. 19-22.

The White House Press Secretary's "Fact Sheet," as quoted at Resp. Supp. Br. 2-3 does not contradict that evidence but simply ignores all the potential costs generated by prohibiting project agreements and all the potential benefits provided by permitting contractors and owners to negotiate such agreements. The sum and substance of the "Fact Sheet" quotation is that project agreements "effectively eliminate the competitive advantages" afforded by "open shop" contractors and thus increase construction costs.

Be that as it may, project agreements have often proved to be the only means for obtaining legal assurances against the economic losses associated with lawful

labor disputes, for assuring mutually-agreeable labor costs over the long term, and for guaranteeing continued access to that pool of skilled workers who desire to work under collectively-bargained conditions of employment. Nothing in the "Fact Sheet"—or the Executive Order—even examines these potential benefits much less demonstrates that in any particular case the net benefits to be expected from a project agreement will necessarily be outweighed by the net benefits to be expected from "open shop" operations.[1]

2. The Executive Order does, to be sure, contradict the legal position of both Respondents and the majority below. Respondents argue, and the lower court opined, that any interference by a state property owner-developer in the decision by its contractors whether to conclude a project agreement on a government project is invalid because preempted by the National Labor Relations Act. *See, e.g.*, Resp. Br. 10; MWRA Pet. App. 30a. By that argument, a state government would be prohibited from issuing an order analogous to Executive Order 12,818—*viz.*, an order barring from state projects all contractors who have negotiated binding collective bargaining agreements containing lawful union contracting and subcontracting clauses.[2]

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[1] While the Executive Order itself clearly recognizes that prohibiting project agreements may at times lead to increased labor strife, and increased overall labor costs, the Order also makes clear that it prohibits such agreements even where such added costs result. *See* Executive Order 12,818, § 4 (stating that increased costs due to increased labor strife may not excuse adherence to the Executive Order's prohibition).

[2] Petitioners' position, in contrast, is that a state agency's involvement in its contractors' project agreement decisions, *based on proprietary concerns*, is no more precluded by the Act than would be the involvement of a private owner-developer. As was found by the courts below in this case, the state agency's involvement in the instant case—which is addressed only to a particular project—is motivated solely by proprietary concerns and is not animated by regulatory purposes. *See* MWRA Pet. App. 74a-75a.

3. Whether and to what extent Petitioners' contentions, or those of Respondents, touch on the validity of E.O. 12,818 is an issue not presented in this case. By its terms, the Executive Order does not extend to any contracts let before the Order's effective date. The Authority has let more than $1 billion in contracts prior to that date. This case was brought to challenge the validity of those contracts. Moreover, there is no realistic prospect that the federal grants made, or to be made and applied against these contracts during the predictable life expectancy of the Executive Order, will exceed that sum.

Respectfully submitted,

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Sections 8(e) and 8(f) of the National Labor Relations Act, 29 U.S.C. 158(e) and (f), expressly permit private employers to implement agreements requiring all contractors performing work on a construction project to adhere to a collective bargaining agreement that establishes labor terms and union recognition for the project as a whole. The question presented is:

Whether the doctrine of implied preemption under the NLRA prohibits a state agency, acting in its proprietary capacity, from implementing such an agreement for a state public works construction project.

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INTEREST OF THE UNITED STATES

The First Circuit in this case held that the doctrine of implied preemption under the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, precludes the state agency responsible for construction of the Boston Harbor clean-up project from exercising a proprietary right that Congress expressly conferred on private employers in Sections 8(e) and 8(f) of the Act, 29 U.S.C. 158(e) and (f)—namely, the right to require all contractors working on a construc-

tion project to adhere to a collective bargaining agreement with a union. If affirmed by this Court, this decision would threaten the validity of master labor agreements that have been utilized by federal, state and local governments for the construction of a wide variety of public projects. In addition, the National Labor Relations Board has a strong interest in the preemptive effect of the Act it administers.

STATEMENT

1. The Massachusetts Water Resources Authority (MWRA) provides water and sewage services for the eastern half of the Commonwealth. Following a lawsuit arising out of the discharge of sewage into Boston Harbor in violation of the Clean Water Act, 33 U.S.C. 1251 *et seq.*, MWRA was ordered by the federal district court to meet a detailed timetable for cleaning up the Harbor. This task will require the expenditure of $6 billion for public works over a ten-year period. See *United States* v. *Metropolitan District Comm'n*, 757 F. Supp. 121, 123 (D. Mass.), aff'd, 930 F.2d 132 (1st Cir. 1991); J.A. 71. The legal framework for carrying out the project is set forth in MWRA's enabling statute, 1984 Mass. Acts 372, and the Commonwealth's public bidding laws. Mass. Gen. Laws ch. 149, §§ 44A-44L (1989); *id.* ch. 30, § 39M (1989 & Supp. 1990); see Pet. App. 3a.[1] Pursuant to those laws, MWRA furnishes the funds for construction (assisted by state and federal grants), owns the facilities to be built, establishes bid conditions, and makes all contract awards. Pet. App. 3a, 74a.

2. In April 1988, MWRA retained Kaiser Engineers, Inc. (Kaiser), a private construction contractor, as its program/construction manager. An important function of Kaiser was to advise MWRA about how to maintain labor-management peace for the duration of the project.

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 91-274.

MWRA had already experienced work stoppages and informational picketing at various sites. MWRA was concerned that, because of the scale of the project and the number of different craft skills involved, it was vulnerable to numerous delays, which would jeopardize compliance with the court-ordered schedule, subject MWRA to contempt sanctions and cost overruns, and prolong the environmental harm. These concerns were heightened by the limited access to the major work site, Deer Island, which would enable a small number of pickets to stop the entire project. Pet. App. 3a-4a, 74a-75a; J.A. 71-76, 77-78, 80-82.

Aware of these concerns, Kaiser recommended to MWRA that it be permitted to negotiate with the 34 unions in the building and construction trades, through the Building and Construction Trades Council (Council), in an effort to arrive at an agreement that would assure labor stability over the life of the project. MWRA's staff accepted Kaiser's recommendation, but with the understanding that any agreement would be subject to final approval by MWRA. Pet. App. 75a, 105a; J.A. 76-77, 82-83. On May 22, 1989, Kaiser and the unions reached agreement on the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement (the Master Labor Agreement). See Pet. App. 107a-140a.

The Master Labor Agreement states that it is the policy of MWRA that "the construction work covered by this Agreement shall be contracted to Contractors who agree to execute and be bound by the terms of this Agreement." Pet. App. 109a. It requires all contractors to recognize the Council as the bargaining representative for all craft employees on the project, to hire workers through the hiring halls of the Council's constituent unions, to require hired workers to join the relevant union within seven days, to follow specified dispute-resolution procedures, to apply the Council's wage, benefit, seniority, apprenticeship and other rules, and to make contributions to the Council unions'

benefit funds. In return, the unions agree not to engage in any strikes or work stoppages during the ten-year life of the project. *Id.* at 5a-6a, 32a, 75a. The Agreement affords a number of other advantages to MWRA as well, including standardization of working hours, travel pay, and other working conditions for all construction employees, and procedures for prompt resolution of labor disputes that could disrupt the project. J.A. 77.

On May 28, 1989, MWRA's Board of Directors approved the Master Labor Agreement. To implement that decision, the Board also ordered that Bid Specification 13.1 be added to the specifications applicable to all new construction work. Pet. App. 5a, 75a.[2] Bid Specification 13.1 provides in pertinent part:

> [E]ach successful bidder and any and all levels of subcontractors, as a condition of being awarded a contract or subcontract, will agree to abide by the provisions of the [Master Labor Agreement] as executed and effective May 22, 1989, by and between [Kaiser], on behalf of [MWRA], and the Building and Construction Trades Council * * * and will be bound by the provisions of that agreement in the same manner as any other provision of the contract * * *.

Id. at 141a-142a. Although successful bidders are thus required to abide by the Master Labor Agreement, any qualified bidder may compete for a contract, without regard to whether the bidder has a pre-existing bargaining relationship with a union, and the contract must be awarded to the lowest qualified bidder. *Id.* at 141a; see also *id.* at 103a, 112a. Moreover, nonunion bidders are not required to sign any other agreement with any unions for other projects. And although a contractor must agree to use the local union's job referral system for project

[2] Massachusetts law requires MWRA, as well as other procuring agencies, to award contracts pursuant to a competitive bidding process. See page 2, *supra*; Pet. App. 3a; *Modern Continental Constr. Co.* v. *Lowell*, 465 N.E.2d 1173 (Mass. 1984).

labor, the system must be operated in a non-discriminatory manner, so that employees who are not already union members are nevertheless eligible for project work. *Id.* at 103a-104a, 110a, 116a-117a.

3. On March 5, 1990, respondent Associated Builders and Contractors of Massachusetts/Rhode Island (ABC)—an association of nonunion contractors—filed this suit seeking an injunction barring enforcement of Bid Specification 13.1 on the ground that it impermissibly interferes with the system of free collective bargaining contemplated by the National Labor Relations Act (NLRA). The district court rejected ABC's preemption claim and denied a preliminary injunction. Pet. App. 72a-83a.[3]

In the meantime, another contractors' association had filed an unfair labor practice charge with the National Labor Relations Board (NLRB), alleging that Kaiser's Master Labor Agreement with the Council violates the NLRA. On June 25, 1990, the NLRB's General Counsel declined to issue a complaint. He found (i) that the Agreement is a valid prehire agreement under Section 8(f) of the NLRA, 29 U.S.C. 158(f), which authorizes such agreements in the construction industry, and (ii) that its provisions limiting work on the project to contractors who agree to abide by the Agreement is lawful under the construction-industry proviso to Section 8(e), 29 U.S.C. 158(e), which carves out an exception to Section 8(e)'s prohibition against "hot cargo" agreements that require an employer to refrain from doing business with any other person. *Building & Trades Council (Kaiser Engineers, Inc.)*, Case 1-CE-71, GC Advice Memo (Pet. App. 88a-93a).

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[3] Respondents also contended that Bid Specification 13.1 is preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, and violates the Fourteenth Amendment, Section 1 of the Sherman Act, 15 U.S.C. 1, and the constitution and laws of Massachusetts. The district court rejected those claims as well, Pet. App. 77a-81a, but the court of appeals did not reach them, *id.* at 30a.

4. On October 24, 1990, a panel of the First Circuit reversed the district court's decision, agreeing with respondents' contention that MWRA's Bid Specification 13.1 is preempted by the NLRA. Pet. App. 49a-71a. On rehearing en banc, the court of appeals, by a 3-2 vote, adhered to that ruling. Id. at 1a-48a.

The en banc majority believed that "the present case is most heavily influenced by the Supreme Court's holdings in the *Golden State Transit Corp* cases,[4] which relied and expanded upon the *Machinists* doctrine."[5] Pet. App. 15a. It understood "the lesson of the *Golden State* cases [to be] that, where interference into the collective bargaining process by the state is *direct*, an asserted state interest of the type at issue here, whether 'proprietary' or otherwise, cannot justify the interference." *Id.* at 30a. The majority concluded that Bid Specification 13.1, by requiring all contractors to comply with the Agreement negotiated by Kaiser, constitutes direct interference with the collective bargaining process. *Id.* at 17a. The majority recognized that Sections 8(e) and 8(f) of the NLRA permit such contractual arrangements in the construction industry, Pet. App. 22a-24a, and that, under those statutory provisions, "the Master Labor Agreement between the Trades Council and Kaiser is a valid labor contract." *Id.* at 24a. But it found the legality of the Agreement itself to be "irrelevant" to the question whether Bid Specification 13.1—by which MWRA implements the Agreement—is preempted. *Id.* at 24a-25a.

Chief Judge Breyer dissented in an opinion joined by Judge Campbell. Pet. App. 32a-45a. Chief Judge Breyer believed that the "only question in this case is whether the NLRA forbids the MWRA, because it is a state agency, to do what the Act explicitly permits a private contractor to do." *Id.* at 32a. In his view, MWRA's con-

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[4] See *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608 (1986) (*Golden State I*); *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103 (1989) (*Golden State II*).

[5] See *Lodge 76, International Ass'n of Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976).

tracting decision affects labor-management relations "only to the extent that Congress foresaw and (with respect to general contractors) explicitly authorized." *Id.* at 34a.

SUMMARY OF ARGUMENT

A. Sections 8(e) and 8(f) of the National Labor Relations Act specifically authorize employers and unions in the construction industry to enter into a "prehire" agreement that establishes wages and other working conditions on a construction project, recognizes the union as the exclusive bargaining agent of employees on the project, and requires all contractors and subcontractors on the project to comply with the agreement. Those Sections thus carve out an exception to the NLRA's usual proscriptions against recognition of and bargaining with a union that has not yet established its majority status, and against "hot cargo" agreements that obligate the employer to refrain from or cease doing business with another person. The majority and dissenters in the First Circuit agreed that the Master Labor Agreement between Kaiser and the Council is lawful under Sections 8(e) and 8(f). The only question is whether MWRA acted unlawfully in adopting Bid Specification 13.1 to implement that Agreement.

B. The NLRA does not prevent a private developer of property from implementing a project labor agreement such as that at issue here. The majority below erred in holding that the NLRA treats state and local governments differently by uniquely prohibiting them from doing the same thing.

1. In invalidating Bid Specification 13.1, the First Circuit relied upon the branch of the implied preemption doctrine known as "*Machinists* preemption." See *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). That branch bars state regulation of private conduct that is neither arguably prohibited nor arguably protected by the NLRA, but is instead left to the free play of economic forces. The question under *Machinists* is whether the State has entered into the bar-

gaining process "to an extent Congress has not countenanced." *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608, 616 (1986). The *Machinists* rationale is inapplicable here. First, Congress has not eschewed regulation of prehire agreements; they are regulated by the NLRA itself. Second, the Agreement between Kaiser and the Council is fully consistent with Sections 8(e) and 8(f). And third, by conditioning its purchase of construction services upon the very sort of labor agreement that Congress explicitly authorized, MWRA "does not 'regulate' the workings of the market forces that Congress expected to find; it exemplifies them." Pet. App. 35a (Breyer, C.J., dissenting). *Wisconsin Dep't of Industry* v. *Gould, Inc.*, 475 U.S. 282 (1986), does not render the proprietary nature of MWRA's actions irrelevant. The only purpose of the state statute in *Gould* was to enforce the NLRA; it was not "a legitimate response to state procurement constraints or to local economic needs." *Id.* at 291. This case, by contrast, is a direct response to such considerations.

2. The majority below found it significant that the construction-industry exceptions in Sections 8(e) and 8(f) apply only to an "employer," which the NLRA defines to exclude a State and its political subdivisions. However, the fact that the NLRA affirmatively authorizes project labor agreements cuts strongly against finding that MWRA acted unlawfully by adopting a bid specification that implements such an agreement. The exceptions in Sections 8(e) and 8(f) apply only to an "employer" because the list of prohibited practices likewise applies only to an "employer." It would be perverse to hold that the effect of Congress's exclusion of States from those prohibitions—out of deference to state autonomy—is to afford the States *less* freedom to order their own construction contracting practices than the Act affords private employers and developers of property.

The background of Sections 8(e) and 8(f) confirms this conclusion. When Congress enacted those provisions in 1959, it intended to preserve the pattern of collective

bargaining in the construction industry. It therefore is significant that the extensive legislative record of the 1959 amendments shows that the pattern of collective bargaining at the time (including use of project labor agreements) was the same for public works as it was for purely private projects. Moreover, the special circumstances in the construction industry that led Congress to permit prehire agreements are the same whether it is a public or private owner of property that lets the contracts for the work.

ARGUMENT

THE NATIONAL LABOR RELATIONS ACT DOES NOT IMPLIEDLY PREEMPT A STATE AGENCY FROM IMPLEMENTING A COLLECTIVE BARGAINING AGREEMENT THAT ESTABLISHES LABOR TERMS AND UNION RECOGNITION FOR A STATE CONSTRUCTION PROJECT

Sections 8(e) and 8(f) of the National Labor Relations Act expressly permit private employers to require all contractors performing work on a construction project to adhere to a collective bargaining agreement that establishes labor terms and union recognition for the project as a whole. The issue here is whether the doctrine of implied preemption under the NLRA nevertheless prohibits a state agency, acting in its proprietary capacity, from implementing such an agreement for a state construction project. In our view, the First Circuit erred in holding that state action to effectuate a lawful project labor agreement is barred by the NLRA.[6]

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[6] The courts of appeals have divided on this question in various contexts. Compare *Glenwood Bridge, Inc.* v. *City of Minneapolis*, 940 F.2d 367 (8th Cir. 1991) (following decision below), with *Phoenix Engineering, Inc.* v. *M-K Ferguson of Oak Ridge Co.*, No. 91-5527 (6th Cir. June 11, 1992) (discussed at note 13, *infra*), and *Associated Builders & Contractors* v. *City of Seward*, No. 91-35511 (9th Cir. June 5, 1992) (discussed at note 17, *infra*).

A. The Master Labor Agreement Between Kaiser Engineers And The Building And Construction Trades Council Is Authorized By Sections 8(e) And 8(f) Of The Act

1. Bid Specification 13.1 was adopted by the Massachusetts Water Resources Authority to implement the Master Labor Agreement that was entered into between Kaiser Engineers and the Building and Construction Trades Council. The Agreement prescribes wages and other working conditions for the Boston Harbor project, recognizes the Council as the exclusive bargaining representative of employees working on the project, and requires all contractors and subcontractors on the project to comply with the Agreement. See pages 3-4, *supra*. Because state law requires MWRA, rather than Kaiser, to award contracts for work on the project and to do so after competitive bidding (see MWRA Pet. 18 & n.8; note 2, *supra*), the Master Labor Agreement between Kaiser and the Council, standing alone, would not have assured that all successful bidders would be bound by the Agreement. Accordingly, Bid Specification 13.1 provides that each successful bidder and all subcontractors, as a condition of being awarded a contract, will agree to abide by the Agreement between Kaiser and the Council. Pet. App. 141a-142a.

Collective bargaining agreements such as the Master Labor Agreement in this case are specifically authorized in the construction industry by Sections 8(e) and 8(f) of the NLRA. Those provisions were enacted in 1959,[7] in response to the special conditions that Congress found, after extensive study, to be present in the construction industry. See *NLRB* v. *International Ass'n of Bridge & Iron Workers*, 434 U.S. 335, 348-349 (1978).

a. Employees in the construction industry are not typically attached to a single employer for a long period of time; they instead work for various contractors or

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[7] Pub. L. No. 86-257, §§ 704(b), 705(a), 73 Stat. 543-544, 545.

subcontractors on a series of projects, staying with any one for only the brief period when their particular skills are required. Consequently, " '[r]epresentation elections in a large segment of the industry are not feasible to demonstrate . . . [a union's] majority status due to the short periods of actual employment by specific employers.' " *Iron Workers*, 434 U.S. at 349 (quoting S. Rep. No. 187, 86th Cong., 1st Sess. 55 (1959)) (second brackets added). It therefore became customary in the construction industry for employers to enter into a collective-bargaining agreement with unions to govern work on projects to be undertaken in a particular geographic area during an upcoming period, even though the unions had not demonstrated majority status on a particular job—and even though, in many instances, the jobs to which the agreement would apply had not even been started when it was entered into.

When Congress amended the NLRA in 1959, it concluded that such "prehire" agreements, in addition to furnishing protection and union representation for covered employees, are " 'necessary for the employer to know his labor costs before making the estimate upon which his bid will be based,' " and for the employer to " 'be able to have available a supply of skilled craftsmen ready for quick referral.' " *Iron Workers*, 434 U.S. at 348 (quoting H.R. Rep. No. 741, 86th Cong., 1st Sess. 19 (1959)); see also *Jim McNeff, Inc.* v. *Todd*, 461 U.S. 260, 265-266 (1983). Section 8(f) preserves these advantages by authorizing employers and unions in the building and construction industry to continue to negotiate prehire agreements, thereby carving out for that industry an exception to the NLRA's proscriptions against recognition of and bargaining with unions that have not yet established their majority status.[8] See *Jim McNeff, Inc.*, 461 U.S. at

[8] It is an unfair labor practice for an employer under Section 8(a)(1) and (2) of the Act, 29 U.S.C. 158(a)(1) and (2), and for a union under Section 8(b)(1)(A), 29 U.S.C. 158(b)(1)(A), to interfere with, restrain, or coerce employees in the exercise of their right (protected by Section 7, 29 U.S.C. 157) to select their repre-

265-266; S. Rep. No. 187, *supra*, at 27-29, 55-56. To protect employee free choice, however, Section 8(f) contains a final proviso that permits employees, once hired, to utilize the NLRB election process under Sections 9(c) and 9(e) of the Act, 29 U.S.C. 159(c) and (e), if they wish to reject the bargaining representative or cancel the union security provisions of the prehire agreement. See *Iron Workers*, 434 U.S. at 345; Pet. App. 24a.

b. Negotiation of a prehire agreement under Section 8(f) would not assure adherence to the contractually specified wages and other conditions of employment at the work site if the employer could avoid those standards by subcontracting project work to an employer who is not a party to the agreement. Subcontracting in fact is the usual practice in the construction industry, and workers "are organized in employment pools to be hired out either by the contractor with whom they have an agreement or by a subcontractor to whom the work is assigned." *Donald Schriver, Inc.* v. *NLRB*, 635 F.2d 859, 880 (D.C. Cir. 1980), cert. denied, 451 U.S. 976 (1981).

To address this problem, Congress in 1959 also enacted the "construction industry proviso" to Section 8(e)'s prohibition against "hot cargo" agreements that require an employer to refrain from doing business with another person. The proviso approves clauses in collective bargaining agreements that require all work on a construction site to be performed by contractors who are bound to honor the applicable area-wide agreement with the appropriate union. Congress thereby preserved the means that employers and unions in the construction industry had adopted for ensuring not only that labor relations on particular jobsites are harmonious, but also that the

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sentative. "The Court has held that both union and employer commit unfair practices when they sign a collective-bargaining agreement recognizing the union as the exclusive bargaining representative when in fact only a minority of the employees have authorized the union to represent their interests." *Iron Workers*, 434 U.S. at 344; see *International Ladies' Garment Workers Union* v. *NLRB*, 366 U.S. 731, 737 (1961).

workers may have the opportunity for terms of employment enjoyed by employees in more stable industries. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 654-660, 661-662 (1982).

2. Operating together, Sections 8(e) and 8(f) validate "project labor agreements" in the construction industry—collective bargaining agreements that establish labor terms and union recognition for a construction project as a whole, and that require all contractors and subcontractors who are subsequently engaged to work on the project to agree to be bound by the agreement. Accordingly, both the majority and dissenting judges below acknowledged that the Master Labor Agreement between Kaiser and the Council "is a valid labor contract." Pet. App. 24a; see also *id.* at 32a, 34a-35a (Breyer, C.J., dissenting). The majority below likewise did not dispute the dissenters' conclusion that there would have been no impermissible distortion of the economic forces that Congress expected to govern labor relations in the construction industry if the Agreement had been approved and implemented by a *private* owner or developer of property, acting in conjunction with its general contractor. See *id.* at 34a-35a (Breyer, C.J., dissenting). They disagreed, however, on whether it makes a difference that in this case it was a state agency (MWRA) that authorized negotiation of the Agreement by Kaiser and then approved the Agreement and effectuated it by requiring contractors and subcontractors to adhere to its terms as a condition of performing work on the project. *Id.* at 27a-28a, 35a, 40a-41a. As we shall now explain, the majority erred in holding that the NLRA impliedly prohibits MWRA from implementing the Master Labor Agreement through Bid Specification 13.1.

B. Bid Specification 13.1, By Which MWRA Implements The Master Labor Agreement Between Kaiser And The Council, Is Not Preempted By The NLRA

The First Circuit held that the NLRA treats state and local governments differently from all other employers—and all other owners and developers of property—by uniquely prohibiting them from implementing the very sort of project labor agreement that is expressly authorized by Sections 8(e) and 8(f) of the Act. The court found that result required even where, as here, the responsible governmental entity has concluded that the agreement would further important interests in promoting labor peace, controlling costs, assuring a readily available source of labor, and meeting mandatory deadlines in the construction of a major public works project that has been found necessary to remedy serious violations of federal law and concomitant environmental harms.

Principles of federalism counsel that an Act of Congress should not be construed to single out state and local governments for special regulatory burdens when they act in a proprietary capacity (and in a manner that is fully consistent with federal law), absent an explicit statement of congressional intent to that effect. Cf. *New York* v. *United States*, No. 91-543 (June 19, 1992), slip op. 12-13; *Gregory* v. *Ashcroft*, 111 S. Ct. 2395, 2403 (1991). Yet the court of appeals pointed to nothing—and there is nothing—in the text or legislative history of the NLRA that suggests a congressional intent to intrude so drastically and uniquely into state and local affairs. Rather, the court relied on the doctrine of implied preemption that has been developed under the NLRA. The underpinnings of that doctrine, however, do not support the court of appeals' ruling, and the text, background, and purposes of the relevant provisions of the NLRA in fact weigh strongly against an extension of the doctrine that would invalidate Bid Specification 13.1.

1. *The Doctrine of Implied Preemption Under The NLRA Does Not Apply To Bid Specification 13.1*

a. In finding MWRA's Bid Specification 13.1 preempted by the NLRA, the court of appeals relied principally upon the branch of the implied preemption doctrine known as "*Machinists* preemption," and on the application of that doctrine in this Court's decisions in the *Golden State* cases. See notes 4 & 5, *supra*.[9] This Court has explained that the *Machinists* doctrine is designed "to govern preemption questions that arose concerning activity that was neither arguably protected * * * nor arguably prohibited" by the specific terms of the NLRA. *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 749 (1985). Under the *Machinists* doctrine, a court must determine if a State's regulation of conduct nonetheless conflicts with Congress's intention that certain labor-related conduct remain "unregulated" and left to "'the free play of economic forces.'" *Machinists*, 427 U.S. at 140 (quoting *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 144 (1971)); see also *Golden State I*, 475 U.S. at 614.[10]

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[9] In *Machinists*, the Court held that the NLRA preempted the authority of a state labor relations board to enjoin a union and its members from refusing to work overtime in order to put economic pressure on the employer in negotiations for renewal of a collective bargaining agreement. See also *Teamsters* v. *Morton*, 377 U.S. 252 (1964) (holding state court preempted from awarding damages for peaceful secondary activity that was neither protected by Section 7 nor prohibited by Section 8 and that Congress did not prescribe when it enacted Section 303 of the Labor-Management Relations Act, 29 U.S.C. 187); but see *New York Telephone Co.* v. *New York Dep't of Labor*, 440 U.S. 519 (1979) (rejecting *Machinists* preemption challenge to state law providing for payment of unemployment benefits to striking workers); *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 751-758 (1985) (rejecting *Machinists* challenge to state law requiring minimum mental health-care benefits); *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 19-22 (1987) (rejecting *Machinists* challenge to state law requiring severance payments to employees affected by plant closing if no collective bargaining agreement required such payments).

[10] The *Machinists* doctrine is distinct from the other major branch of NLRA preemption doctrine—*Garmon* preemption—which applies

In *Golden State I*, the Court held that the city's action in conditioning renewal of the company's taxicab operating license on the company's settlement of its labor dispute with the union by a certain date was preempted by the NLRA. The Court reasoned that the city had "[entered] into the substantive aspects of the bargaining process to an extent Congress has not countenanced" by setting "time limits on negotiations [and] economic struggle." 475 U.S. at 616 (quoting *Machinists*, 427 U.S. at 149). In *Golden State II*, the Court held that the company was entitled to sue for compensatory damages under 42 U.S.C. 1983, because the city's action in violating the company's "right to use permissible economic tactics to withstand the strike" deprived it of "a personal liberty" guaranteed by federal law. 493 U.S. at 112; see also *id.* at 109.[11]

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to state regulation of conduct that is either arguably protected or arguably prohibited by the NLRA's specific regulatory terms. See *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959); *Metropolitan Life*, 471 U.S. at 748-751 (describing "two distinct NLRA pre-emption principles"). *Garmon* preemption "protects the primary jurisdiction of the NLRB to determine in the first instance what kind of conduct is either prohibited or protected by the NLRA," *Metropolitan Life*, 471 U.S. at 748, and to prescribe the appropriate remedy for a violation, *Garmon*, 359 U.S. at 247.

Although relying primarily on the *Machinists* doctrine, the majority below expressed the view that the *Garmon* preemption doctrine also "most likely applies to Specification 13.1." Pet. App. 30a; see also *id.* at 15a, 21a. The only explanation for that view was an assertion that the Master Labor Agreement's provision for union recognition interferes with employee rights under Section 7. Pet. App. 21a. However, as we have explained at pages 11-12, *supra*, Section 8(f) specifically sanctions prehire agreements in the construction industry and protects the employees' freedom of choice by different means—by permitting them to file a petition for a representation election during the term of the agreement. Indeed, the NLRB's General Counsel dismissed an unfair labor practice complaint challenging the lawfulness of the Agreement between Kaiser and the Council under the NLRA. Pet. App. 88a-93a.

[11] The Court explained in *Golden State II* (475 U.S. at 112):

> The *Machinists* rule is not designed—as is the *Garmon* rule [see note 10, *supra*]—to answer the question whether state or federal regulations should apply to certain conduct. Ratner, it

b. The majority below read the *Golden State* cases as establishing an absolute rule that "where interference into the collective bargaining process by the State is *direct*, an asserted state interest of the type at issue here, whether 'proprietary' or otherwise, cannot justify the interference." Pet. App. 30a. The *Golden State* decisions, however, do not announce any such absolute rule of preemption. Rather, the test under *Golden State* is whether the State has "entered into the bargaining process to *an extent Congress has not countenanced.*" *Golden State I*, 475 U.S. at 616 (emphasis added) (quoting *Machinists*, 427 U.S. at 149). Thus, the *Golden State* decisions require inquiry into whether the particular state action conflicts with an intention by Congress to leave the specific conduct involved to the free play of economic forces. In *Golden State* itself, for example, the city, by requiring that the company settle its labor dispute with the union by a certain date, clearly intruded upon private conduct that Congress had intended to be unregulated in furtherance of the national labor policy of encouraging private settlement of labor disputes (and of allowing resort to economic weapons for that purpose).[12]

By contrast, the state action at issue here does not cause any impermissible interference with federal labor policy. First, Congress chose not to leave unregulated the use of project labor agreements in the construction industry. That subject is regulated by the NLRA itself, which specifically approves such agreements, subject to certain conditions. As a result, the usual predicate for *Machinists* preemption—a federal statutory policy to leave the conduct in question unregulated—is lacking. See *Phoenix Engineering, Inc.* v. *M-K Ferguson of Oak*

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is more akin to a rule that denies either [the federal or state] sovereign the authority to abridge a personal liberty.

[12] Similarly, in *Machinists*, the State, by barring the union from inducing employees to refuse to work overtime in order to put economic pressure on the employer, deprived the union of an economic weapon that the NLRA neither prohibited nor protected, but left the union free to utilize.

Ridge Co., No. 91-5527 (6th Cir. June 11, 1992), slip op. 21-23.[13] Second, the Master Labor Agreement between Kaiser and the Council that is implemented by Bid Specification 13.1 is fully consistent with Sections 8(e) and 8(f) of the NLRA. There accordingly can be no claim of an actual conflict between state and federal law. See note 14, *infra*. Third, in adopting Bid Specification 13.1, MWRA was not acting in the capacity of a regulator of private conduct, as the state or local government was in *Machinists* and the *Golden State* cases; MWRA was acting in a proprietary capacity—as a market participant—by specifying the conditions under which it will enter into contracts with private parties. See *Phoenix Engineering*, slip op. 24; Pet. App. 44a (Breyer, C.J., dissenting); cf. *Associated Builders & Contractors, Inc.* v. *City of Seward*, No. 91-35511 (9th Cir. June 5, 1992), slip op. 6321-6322.

c. The majority below found it irrelevant that MWRA was acting in a proprietary rather than a regulatory capacity, believing that *Wisconsin Dep't of Industry* v. *Gould, Inc.*, 475 U.S. 282 (1986), requires rejection of that distinction. Pet. App. 25a-30a. *Gould* held that a

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[13] In *Phoenix Engineering*, the Sixth Circuit rejected the claim that the NLRA prohibited a private general contractor retained by the U.S. Department of Energy (DOE) from entering into a project labor agreement with the Building Trades Council for construction services at DOE's nuclear facility at Oak Ridge, Tennessee. In the Sixth Circuit's view, "[t]he *Golden State* cases * * * seem to hold that *Machinists* preemption prevents regulation, either by a state or the federal government, of aspects of labor-management relations left unregulated by the NLRA." Slip op. 18. Noting the detailed regulation of prehire agreements in Section 8(f), the court concluded that the "Project Labor Agreement is an example of a labor practice that Congress closely regulated and *Machinists* preemption does not apply." Slip op. 23.

The government argued in *Phoenix Engineering* (Br. at 28-35) that the *Machinists* doctrine, which governs preemption of state laws that might affect the system of free collective bargaining under the NLRA, was not applicable to the actions of a federal agency, and that the statutes and implementing regulations governing construction of DOE facilities in any event rendered the project labor agreement in that case lawful.

Wisconsin statute debarring repeat violators of the NLRA from doing business with the State was preempted by the NLRA. In rejecting the contention that the State's action was permissible because it was acting as a purchaser of services, the Court acknowledged that "[n]othing in the NLRA * * * prevents private purchasers from boycotting labor law violators," but added that "[t]he Act treats state action differently * * * because in our system States simply are different from private parties and have a different role to play." 475 U.S. at 290.

Gould, however, is wholly different from this case. The state debarment rule in *Gould* "serve[d] plainly as a means of enforcing the NLRA," and "[n]o other purpose could credibly be ascribed" to it. 475 U.S. at 287. Here, by contrast, MWRA is not seeking to enforce the NLRA, punish NLRA violators, or further any regulatory role. It seeks only to protect its *own* proprietary interests in the stable and efficient development of a major governmental project, and it does so as any private developer or general contractor might—through arrangements relating to a lawful project labor agreement. Indeed, the project labor agreement at issue here actually was negotiated and entered into by Kaiser Engineers, the private construction manager that MWRA selected.

Gould does not hold that where, as here, the State is seeking to further its legitimate proprietary concerns by implementing a contractual arrangement that is expressly authorized by the NLRA, its action nevertheless is preempted. To the contrary, the Court noted in *Gould* that it was "not saying that state purchasing decisions may never be influenced by labor considerations," and that it was "not faced [t]here with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs." 475 U.S. at 291.[14] This case, by contrast, directly

[14] We do not contend, of course, that a State's actions are automatically insulated from preemption under the NLRA whenever it

involves "state procurement restraints" and "local economic needs," and therefore presents the question left open by *Gould*. See *Phoenix Engineering*, slip op. 23-24.[15]

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acts as a purchaser of services or other market participant. While "[t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market," *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 437 (1980), "[w]hat the Commerce Clause would permit States to do in the absence of the NLRA is * * * an entirely different question from what States may do with the Act in place." *Gould*, 475 U.S. at 290. As the Court added in *Gould*, "we cannot believe that Congress intended to allow States to interfere with the 'interrelated federal scheme of law, remedy, and administration' * * * under the NLRA as long as they did so through exercises of the spending power." *Id.* at 290 (quoting *Garmon*, 359 U.S. at 243); see also *Brown* v. *Hotel Employees Union Local 54*, 468 U.S. 491, 501 (1984) ("If employee conduct is protected under [Section] 7 [of the NLRA], then state law which interferes with the exercise of these federally protected rights creates an actual conflict and is pre-empted by direct operation of the Supremacy Clause.").

Accordingly, a State could not require that an employer negotiate or be bound by a prehire agreement with a union as a condition of obtaining a state contract outside the construction industry, because, except in that industry, such an agreement would abridge the Section 7 right of employees to select a representative of their own choosing, or to refrain from having a union representative altogether. Moreover, although prehire agreements are permissible with respect to construction projects, a State could not deny employees, once hired, the right guaranteed by the final proviso to Section 8(f) to petition the Board for an election to reject or change the union representative, or to cancel the union security provisions of the agreement. See page 12, *supra*. Here, however, MWRA's action, which is confined to a single construction project, is fully consistent with Section 8(f) (as well as Section 8(e)).

[15] Moreover, as the Sixth Circuit pointed out in *Phoenix Engineering*, "*Gould* implicated *Garmon*, and not *Machinists*, preemption." Slip op. 24; see 475 U.S. at 286-289. It is one thing to conclude, as the Court did in *Gould*, that under *Garmon* and its progeny, a State cannot, merely by invoking its spending power, interfere with the statutory procedures and remedies for violations of the NLRA that are committed by that Act to the primary jurisdiction of the NLRB. See note 10, *supra*. It would be quite another to invoke that reasoning to its fullest extent in establishing the contours of the *Machinists* doctrine, which is not premised on

d. The regulation and approval of prehire agreements provided by Sections 8(e) and 8(f) refute the notion that the state action challenged here deprived prospective contractors on the Boston Harbor project of a right, protected by the NLRA, "to negotiate their own terms of employment or to operate on a non-union basis." Br. in Opp. 4; Pet. App. 18a, 21a. Although employers in other industries may have that right, the construction industry proviso to Section 8(e) limits both the legal right and practical ability of contractors and subcontractors in that industry to order their own labor relations: by virtue of the proviso, a general contractor may require all other employers working on a particular jobsite to adhere to the terms of a project labor agreement it has entered into with union representatives. See *Woelke & Romero*, 456 U.S. at 663; *Jim McNeff, Inc.*, 461 U.S. at 270 n.9.

Accordingly, the nonunion contractors that are members of respondent Associated Builders and Contractors plainly would have had no right protected by the NLRA to obtain work on a nonunion basis at the Boston Harbor project if that project had been privately owned, if the owner had retained Kaiser as its general contractor, and if Kaiser, in turn, had entered into a project labor agreement identical to the one challenged here. It follows that MWRA is trenching on no "right" or "liberty" (*Golden State II*, 493 U.S. at 109, 112) accorded by the NLRA to nonunion (or other) contractors by requiring them, as a condition of obtaining work on the project, to abide by

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preserving the primary jurisdiction of the NLRB. Under the *Machinists* doctrine, Congress has, by hypothesis, chosen to leave resolution of certain matters to the "free play of economic forces." 427 U.S. at 140. Those forces necessarily are played out in the market context in which the employer and its customers, competitors, and employees operate, and in light of the purchasing and other market decisions they make. The federal, state, and local governments are major market participants in many industries, and the conditions on which they choose to purchase therefore are, in general, simply one set of factors in the "free play of economic forces." See also page 29, *infra*.

the Master Labor Agreement that Kaiser entered into with the Council. Since "[t]here is no inalienable right to work as a non-union contractor on publicly funded jobs," we, like the Sixth Circuit in *Phoenix Engineering*, "do[] not see why the *Machinists* doctrine should be extended to protect third parties who are free to accept the bid conditions or look for other work." Slip op. 20-21.

In short, by conditioning the purchase of construction services for its own project "upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find, [MWRA] does not 'regulate' the workings of the market forces that Congress expected to find; it exemplifies them." Pet. App. 35a (Breyer, C.J., dissenting).

2. The Text, Background, And Purposes Of The Relevant Provisions Of The NLRA Cut Strongly Against Extension Of The Implied Preemption Doctrine To Invalidate Bid Specification 13.1

a. The majority below acknowledged that "under the exceptions established by Sections 8(e) and 8(f) of the Act, the Master Labor Agreement between the Trades Council and Kaiser is a valid labor contract." Pet. App. 24a. But it found that conclusion to be "irrelevant to the preemption issue at hand," because the "history of Sections 8(e) and 8(f) discusses private employers only," and nowhere "is there any indication that a state would be allowed to impose this type of regulation." Pet. App. 24a-25a. The majority also believed that "Congress is perfectly capable of distinguishing between states and private parties when it chooses, and it has so chosen here," since Sections 8(e) and 8(f) refer to an "employer," and Section 2(2) of the Act, 29 U.S.C. 152(2), excludes from the definition of that term "any State or political subdivision thereof." Pet. App. 27a. The majority misapprehended the significance of these statutory provisions.

The fact that Sections 8(e) and 8(f) of the NLRA specifically deem a project labor agreement such as that between Kaiser and the Council to be lawful cuts power-

fully *against* the conclusion that MWRA acted unlawfully under the NLRA when it adopted a bid specification that effectuates the Kaiser-Council Agreement by requiring all contractors and subcontractors on the Boston Harbor project to adhere to its terms. Moreover, as Chief Judge Breyer pointed out in dissent, "Congress had two perfectly good reasons for not making the construction-industry exceptions explicitly applicable to states, and neither of these reasons suggests any pre-emptive intent." Pet. App. 41a. First, "the list of forbidden practices, to which the exceptions apply, itself applies only to an 'employer,' defined to exclude 'any State,' thereby leaving the regulation of labor relations between a state and its own employees primarily to state law"; accordingly, a "drafter, writing a statutory exception to the resulting prohibition, would not normally extend its scope beyond those subject to the prohibition in the first place." *Ibid.*[16] Second, when Congress enacted the construction industry exceptions in 1959, it "had little reason to believe that a court might find, hidden in the silence of the Act, some other relevant prohibition applicable to a state." *Ibid.*

The majority below also drew the wrong lesson from the exclusion of the States and their political subdivisions from the definition of the term "employer" in Section 2(2) of the Act. As a result of that exclusion, the NLRA "leaves regulation of the labor relations of state and local governments to the States." *Abood* v. *Detroit Board of Educ.*, 431 U.S. 209, 223 (1977). The purpose of the exclusion was to preserve the autonomy of state and local governments in matters that might otherwise fall under the NLRA. It would be perverse to conclude that the result of Congress's decision not to include States within the ambit of the Act (and therefore within the exceptions in Sections 8(e) and 8(f)) is to afford the States *less*

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[16] Cf. *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 112 S. Ct. 683, 690 (1992) ("a proviso can only operate within the reach of the principal provision it modifies").

freedom to order their own construction contracting practices than the Act affords to private employers and developers of property. As the Ninth Circuit recently observed, "[i]n light of Section 2(2), we fail to see how Congress could have intended to prohibit a public employer from agreeing to a work preservation clause to which a private employer is free to agree." *Associated Builders & Contractors, Inc.* v. *City of Seward*, slip op. 6325.[17]

b. The background of Sections 8(e) and 8(f) confirms that the NLRA does not impliedly preempt the use of project labor agreements on construction projects undertaken by a governmental agency, whether federal, state, or local. This Court has concluded that, when Congress enacted those provisions in 1959, it intended to preserve the "'*status quo*'"—the then-existing "pattern of collective bargaining in the construction industry." *Woelke & Romero*, 456 U.S. at 657 (quoting *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 637 (1967)); see also *Connell Constr. Co.* v. *Plumbers & Steamfitters Union Local No. 100*, 421 U.S. 616, 628-629 (1975); H.R. Conf. Rep. No. 1147, 86th Cong., 1st Sess. 39-40 (1959); 105 Cong. Rec. 17,899-17,900 (1959) (remarks of Sen. Kennedy). The Court accordingly has

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[17] In *Seward*, the union that represented the city's own electric utility employees, in order to protect those employees' interests, entered into an agreement with the city limiting the contracting of work on a renovation project to contractors who agreed to enter into a labor agreement with the union. In holding that the city's action was not barred under *Golden State*, the Ninth Circuit distinguished the instant case on the ground that "[t]he MWRA in *Boston Harbor* did not act out of its concerns as a public employer; unlike the City of Seward, it did not employ workers who had traditionally performed the work that would be contracted out." Slip op. 6325-6326. We do not believe this distinction is significant. Governmental employers typically hire private contractors for large public works projects; they do not maintain a force of employees for that contingency. To limit a governmental entity's right to make proprietary decisions consistent with the NLRA's construction industry provisions only where that choice impacts on employees on its payroll would effectively deny it that choice in most cases.

found it appropriate, in order to determine the legality of contractual relationships in the construction industry, to "examin[e] Congress' perceptions regarding the status quo in the construction industry." *Woelke & Romero*, 456 U.S. at 657; see *id.* at 657-660. Following the same analytical approach here, it is significant that in the extensive legislative record developed during the decade prior to enactment of the 1959 amendments,[18] the pattern of collective bargaining that was described for construction of public works (*e.g.*, dams, roadways, and bridges), undertaken both by the United States and by state and local governments, was no different from that for private projects.

For example, in *Woelke & Romero* the Court relied (456 U.S. at 658-659 & n.11) on the discussion in the 1959 hearings of *Associated General Contractors of America, Inc. (St. Maurice, Helmkamp & Musser)*, 119 N.L.R.B. 1026 (1957), review denied and enforced *sub nom. Operating Engineers Local Union No. 3* v. *NLRB*, 266 F.2d 905 (D.C. Cir.), cert. denied, 361 U.S. 834 (1959). That case involved a union agreement governing construction work on Travis Air Force Base pursuant to a contract with the Army Corps of Engineers. 119 N.L.R.B. at 1027, 1049; 266 F.2d at 906.[19] The Court in *Woelke & Romero* also cited (456 U.S. at 662 n.13) the explanatory memorandum prepared by Representatives Thompson and Udall (see 105 Cong. Rec. 15,538-15,543

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[18] The problem of accommodating the provisions of the NLRA to the special circumstances of the construction industry was the subject of intensive congressional review, commencing in 1951 and culminating in the 1959 amendments. This history is summarized in the dissenting opinion below. Pet. App. 37a-40a.

[19] As the Court pointed out in *Woelke & Romero*, 456 U.S. at 659 n.11, the court of appeals' opinion in *Operating Engineers* was placed in the record of the 1959 House Hearings, and employer and union representatives referred to the case in their testimony. See *Labor-Management Reform Legislation: Hearings on H.R. 3540, etc., Before a Joint Subcomm. of the House Comm. on Education and Labor*, 86th Cong., 1st Sess. 801, 803-807, 2364, 2367 (1959).

(1959)), which stated that "the building trades unions and contractors follow the practice of working out a scale of wages and other terms of employment which will be applicable to all projects within a specified geographical area for a substantial period of time," and "[t]his practice has been encouraged by the Atomic Energy Commission and other Government agencies." *Id.* at 15,541.[20]

The hearing record in prior years likewise established that the use of project labor agreements was part of the pattern of collective bargaining on public as well as private construction projects. Thus, in 1953, a representative of a California general contractors' association testified before the Senate Committee:

> The essential nature of the construction industry requires that contractors negotiate labor agreements before hiring workmen. * * * [C]ontractors must have [legislative relief] because of the practical operational conditions under which millions of dollars of Federal and State and local competitive-bidding jobs are carried on.

Taft-Hartley Act Revisions: Hearings Before the Senate Comm. on Labor and Public Welfare, 83d Cong., 1st Sess. 1302 (1953) (testimony of Gardiner Johnson). The President of the Building and Construction Trades Department of the AFL-CIO noted that, by virtue of a project labor agreement, an Atomic Energy Commission plant had been completed without "1 minute lost by industrial strife of any kind." *Id.* at 1672 (Richard J. Gray). And another industry representative explained that contractors

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[20] See also *Labor-Management Reform Legislation: Hearings on S. 505, etc., Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 86th Cong., 1st Sess. 495 (1959) (testimony of Richard J. Gray, President of Building and Construction Trades Department, AFL-CIO, quoting S. Rep. No. 1509, 82d Cong., 2d Sess. 3-4 (1952)) (the "U.S. Government * * * is directly concerned in the proper pricing and completion of construction projects for defense installations and production facilities," and prehire agreements are important for "large projects, particularly for defense installations and plants").

and unions frequently negotiated project labor agreements to build plants for federal agencies, including the Corps of Engineers, Department of the Navy, and General Services Administration. *Id.* at 1343 (J.J. O'Donnell). There was similar testimony in connection with a precursor bill that passed the Senate in 1952. See 98 Cong. Rec. 5028-5029 (1952); S. Rep. No. 1509, *supra*, at 3-4.[21]

As this Court has repeatedly stressed, "[t]he purpose of Congress is the ultimate touchstone" in resolving pre-emption questions under the NLRA. *Metropolitan Life*, 471 U.S. at 747 (quoting *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978)). Here, the purpose of Congress in enacting Sections 8(e) and 8(f) in 1959 was to preserve the pattern of collective bargaining in the construction industry. Because that pattern included the use of project labor agreements on public as well as private projects, the purpose of Congress in amending the

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[21] The Senate Subcommittee was informed that project labor agreements had been successfully employed for construction of a powerhouse on the Skagit River pursuant to a contract let by the Seattle Department of Public Works, and for construction of the McNary Dam in Oregon and Pine Flat Dam in California pursuant to contracts with the Army Corps of Engineers. *To Amend the National Labor Relations Act, 1947, With Respect to the Building and Construction Industry: Hearings on S. 1973 Before the Subcomm. on Labor and Labor-Management Relations of the Senate Comm. on Labor and Public Welfare*, 82d Cong., 1st Sess. 175-176 (1951) (Gardiner Johnson) (*1951 Hearings*). In addition, James J. Reynolds, Jr., the NLRB's then-acting chairman, filed a memorandum that brought to the Subcommittee's attention a number of construction industry cases that had recently come before the Board. Those cases involved such projects as construction of the Hanford, Washington, nuclear research facility for the Atomic Energy Commission (see *Guy F. Atkinson & J.A. Jones Constr. Co.*, 84 N.L.R.B. 88 (1949)), the Keswick Dam in California for the Department of the Interior (see *W.B. Willett Co.*, 85 N.L.R.B. 761 (1949)), the Brooklyn-Battery Tunnel for the New York City Tunnel Authority (see *Compressed Air, Local Union No. 147*, 93 N.L.R.B. 1646 (1951)), and a hospital in Kansas City, Missouri, for the Veterans Administration (see *Del E. Webb Construction Co.*, 95 N.L.R.B. 75 (1951)). *1951 Hearings* at 87, 97, 103, 105.

NLRA in 1959 requires rejection of respondents' argument that the NLRA, as so amended, nevertheless impliedly preempts MWRA from implementing the Master Labor Agreement for the Boston Harbor public works project. That is especially so since there is no affirmative indication in the background of those amendments that Congress intended to preserve the status quo only on projects undertaken by private developers, and at the same time to outlaw project labor agreements on government projects or prohibit government agencies from implementing such agreements in the manner MWRA did here. Because the relevant substantive restrictions in the NLRA applied only to employers in the private sector, all that was necessary to preserve the status quo in the construction industry was to include exceptions to those restrictions. It is for this reason that the exceptions in Sections 8(e) and 8(f) likewise are directed only to employers in the private sector.

c. The circumstances in the construction industry that caused Congress to authorize prehire contracts—the short duration of employment, the practice of employees' working for many employers, and the contractors' need to estimate costs in advance and to have available a steady supply of labor (see page 11, *supra*)—are present whether it is a public agency or a private party that lets the contracts for the work. This similarity makes it most unlikely that Congress, without saying so, intended to deny to the States and their political subdivisions, when acting in a proprietary capacity, the potential benefits of agreements that it expressly authorized in Sections 8(e) and 8(f).

As a result, the view of the majority below would produce arbitrary distinctions in prehire practices within the construction industry. Whether there is a prehire agreement covering an entire project "would often reflect, not size of the project, or desire of the parties, or special conditions of the industry, but simply whether or not the entity letting the contracts is an arm of the state or private." Pet. App. 40a-41a (Breyer, C.J., dis-

senting). And even among state projects, "the presence or absence of such an agreement would depend upon whether state law permits the state in question to hire a private general contractor (who, then, presumably, would be free to enter into a prehire agrement) or, as in Massachusetts, requires the state agency to sign the relevant contracts itself." *Ibid.*

Project labor agreements have been used for many years on a wide variety of public projects, including defense installations, nuclear facilities, hospitals, tunnels, airports, convention centers, hydroelectric projects, waste treatment facilities, and mass transit systems.[22] Governmental agencies responsible for those projects, and the private contractors who perform the work, have formed the judgment that such agreements may sometimes help to ensure labor peace and stability, an available labor supply, and timely completion of major construction projects that further substantial public purposes. The undertaking of public works projects is a central function of state and local governments. Such projects therefore "implicate 'interests so deeply rooted in local feeling and responsibility,' that pre-emption should not be inferred," *Gould*, 475 U.S. at 291 (quoting *Garmon*, 359 U.S. at 243-244)—where, as here, the labor agreement applicable to the project in question is fully consistent with federal law.

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[22] See U.S. Dep't of Labor, Labor-Mgmt. Services Admin., *The Bargaining Structure in Construction: Problems and Prospects* 12, 14 (1980); D. Mills, *Industrial Relations & Manpower in Construction* 40 (1972); pages 25-27, *supra*; Council Pet. 12-13 & n.5; Pet. 12; California, *et al.*, Amicus Br. 2-3 n.1.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Nos. 91-261, 91-274

In the Supreme Court of the United States

October Term, 1991

THE MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, INC., ET AL.
Petitioners,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.
Respondents.

PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, MASSACHUSETTS, MINNESOTA, NEW JERSEY, PENNSYLVANIA, WYOMING, AND THE COMMONWEALTH OF NORTHERN MARIANA ISLANDS IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

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ISSUE PRESENTED

Does the National Labor Relations Act clearly express an intent to preempt states and their subdivisions from determining labor relations policy on their own public works projects in the manner that Congress expressly authorized for the private construction industry?

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UNITED STATES SUPREME COURT

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STATEMENT OF INTEREST OF AMICI CURIAE

The states identified above submit this brief amici curiae to urge the Court to grant certiorari. This brief emphasizes the federalism concerns inherent in the public construction and procurement contexts. The amici argue that State and local agencies maintain

flexibility over labor agreements on their own public works projects, and that the National Labor Relations Act ("NLRA") does not preempt local control.

The amici are sovereign states that possess the authority over public works projects within their jurisdictions. In addition to the project labor areements cited in the Trade Council's petition (No. 91-261), pp. 12-13, n.5 and in the MWRA's petition (No. 91-274), p. 12, the projects set forth in the margin have been completed under project labor agreements.[1/] The reasoning of the

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1/ In the Minneapolis-St. Paul metropolitan area, there have been dozens of recent public works projects that have been completed under project labor agreements, including the following: the Hubert H. Humphrey Metrodome, the new University of Minnesota Hospital, the Minneapolis

(footnote continued)

majority opinion below alters the balance of state and federal control over such public works projects.

In particular, the amici view this case as an important test of their control over labor relations on state and local public works projects. A definitive affirmation of those powers in this case would preserve the constitutional balance of power between the states and the Federal Government and provide guidance to states who wish to exercise their powers in accordance with principles of federalism.

(footnote continued)

Waste-to-Energy Plant, the Minneapolis Convention Center, the Nicollet Mall Project, the Hennepin County Government Center, the St. Paul Civic Center, the Ramsey County Courthouse renovation, and the Seneca, Blue Lake and Empire waste-water treatment facilities.

The interest of the amici transcends any dispute over the particular content of the project labor agreement in this case. The amici seek to preserve the constitutional balance between the powers of the Federal Government and those of the states, as established by the framers of the Constitution. They seek to preserve the states' autonomy and their identities as independent repositories of sovereign authority within our federal system.

ARGUMENT

The majority opinion below reads into the National Labor Relations Act implied restrictions on labor relations on state and local government public works projects that do not apply to private projects. Congress has not expressed these restrictions expressly or even by necessary implication. On

the contrary, the NLRA authorizes the state action in question.

By finding preemption so readily here, the Court of Appeals holding violates the basic tenets of federalism that underlie our constitution. Gregory v. Ashcroft, 111 S.Ct. 2395 (1991).

1. The Court Should Grant Certiorari In Order To Correct The Imbalance Between State and Federal Authority Created By the Majority Opinion Below.

The holding of the majority below wrests control over public construction projects from the states and their subdivisions. As a result, states, public authorities and municipalities have lost flexibility over labor relations on their public works projects. This intrudes into the states' "substantial sovereign authority", thereby depriving the people of the benefits of decentralized

government that underlie the structure of our government:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Id., 111 S.Ct. at 2399.

The principles of federalism apply with full force to a state authority's proprietary interests on its own public works project. In this case, all of the interests at stake implicate the right of the people and their local representatives to control local public works projects and to choose labor policy that will best serve the public

interest.[2/]

In Reeves, Inc. v. Stake, 447 U.S. 429, 437, 439 (1980), the Court found "no indication of a constitutional plan to limit the ability of the States

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2/ Most discussion regarding the states as proprietors, or as participants in the market, has occurred in the context of the dormant Commerce Clause. See Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976); Reeves, Inc. v. Stake, 447 U.S. 429 (1980); White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983); South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984). Cf. United Building & Construction Trades Council v. Mayor and Council of Camden, 465 U.S. 208 (1984) (privileges and immunities clause). It is true that these cases do not address the question of what the States may do, given enactment of the National Labor Relations Act. Wisconsin Dept. of Industry, Labor & Human Relations v. Gould, Inc., 475 U.S. 282, 290 (1978). Here, however, the NLRA does not withdraw state authority grounded in legitimate proprietary interests. Moreover, identifying the scope and purposes of the market participant doctrine sheds considerable light on what interests the MWRA may assert, as owner of the jobsite and as purchaser of construction labor for its own project.

themselves to operate freely in the free market", and noted that "the competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis."

Reeves' articulation of the states' "role . . .'" as guardian and trustee for its people"'", 447 U.S. at 438, is instructive here.[3/] The MWRA's

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3/ Reeves was quoting Heim v. McCall, 239 U.S. 175 (1915). In fact, the full quotation from Heim is even more pertinent:

> Atkin v. Kansas, 191 U.S. 207, 222, 223 . . . declared, and it was the principle of decision, that "it belongs to the State, as guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of municipalities."

Heim, supra, 239 U.S. at 191.

interests bear directly upon the efficient, expeditious and effective completion of the MWRA's sewerage treatment facilities themselves. The MWRA's duty to avoid the costs of delay, in the form of increased construction costs, potential fines, and environmental harm, falls squarely within its duty to its ratepayers and to the voters to manage its property and purchasing policies so as to achieve the greatest benefit from the Harbor cleanup project at the least cost. It would be a breach of that public trust to subject the MWRA's ratepayers to the costs and risks of delay.

The MWRA's requirement regarding Bid Specification 13.1 is limited to the "discrete, identifiable class of economic activity in which [it] is a

major participant." White, supra, 460 U.S. at 211, n.7. Without a compelling congressional direction, the Courts should not conclude that the otherwise lawful project labor agreement became unlawful because of the MWRA's involvement, which in turn arose only because of its strong proprietary interest in timely and cost-effective completion of its sewerage treatment facilities.

The MWRA, acting as proprietor of the construction site and of the sewerage facilities, should "share existing freedoms from federal constraints", Reeves, supra, 447 U.S. at 439, that are available to private parties under the NLRA. Even the majority below conceded that "the Master Labor Agreement between the Trades Council and Kaiser is a valid labor

contract". See A. 24a.[4/] If MWRA is to share existing freedoms from federal constraints, then it must be allowed to choose clauses that were explicitly authorized for private employers under sections 8(e) and 8(f) of the NLRA.

While Congress, acting under its constitutionally conferred powers, "may impose its will on the States," "[t]his is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly." Gregory, supra, 111 S.Ct. at 2400.

The majority opinion below subverts this constitutional scheme by departing from the rule that "'a clear and manifest purpose' of preemption is

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4/ For convenience, the amici cite to the appendix of the MWRA's petition.

always required." Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 503 (1988) (emphasis added). See also Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146-47 (1963) ("In other words, we are not to conclude that Congress legislated ouster of [a state statute] . . . in the absence of an unambiguous congressional mandate to that effect.") (emphasis added).

These considerations apply with full force to the NLRA challenge on the present facts. "The National Labor Relations Act leaves regulation of the labor relations of state and local government to the States." Abood v. Detroit Bd. of Education, 431 U.S. 209, 223 (1977). The exemption of the states from the definition of employer is strong evidence of congressional intent

in this regard. 29 U.S.C. § 152(2).

There are "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959); See also Gould, supra, 475 U.S. at 291 ("legitimate response to State procurement constraints or to local economic needs"). The cases demonstrate that the interests at stake here fall within this exception.

Nothing expressed or implied in the NLRA comes close to the type of Congressional statement that warrants preemption. 29 U.S.C. § 152(2) strongly supports the conclusion that preemption was not intended in the circumstances

alleged by ABC. A private employer in the construction industry has the benefit of Sections 8(e) and 8(f). A state using its own employees would be exempt from the NLRA under Section 2(2). It strains basic principles of federalism and logic to conclude that, without saying so, Congress intended to preempt the Agreement merely because a governmental party is involved.

2. The Court Should Grant Certiorari Because the Courts Of Appeals Are Misreading This Court's Decisions In A Way That Injures Federalist Principles.

In order to place greater burdens upon governmental employers and developers than upon private companies, the majority below relied on Gould, supra. Gould did not establish the broad, judge-made preemption that the Court below seems to apply. The decision below demonstrates the need for

this Court to define the limits of its decision in Gould.

Indeed, this Court distinguished the present context from the one in Gould, supra, 475 U.S. at 291:

> We are not faced here with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs, or with a law that pursues a task Congress intended to leave to the States.

See also, Golden State Transit Corp. v. Los Angeles, 475 U.S. 608, n.8 (1985). Instead of using its procurement role to effect a regulatory purpose, here, MWRA is using that role to achieve procurement goals, which fall within the exceptions to Gould.

In the first place, Congress intended to allow the state to affect labor relations on state public works projects funded by state agencies on

state land. See U.S.C. § 152(2);[5/] Abood, supra, 431 U.S. at 223; New York Tel. Co. v. New York State Dept. of Labor, 440 U.S. 519, 540-545 (1979).

Second, the District Court's findings regarding the origin of the labor provisions (App. 74a-76a) establish at least four important proprietary interests of the MWRA and the Commonwealth: (1) the need for labor peace and stability on the jobsite of a public works project owned by the MWRA, (2) avoiding the risk of substantial fines against the MWRA for non-compliance with the court-ordered

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5/ The Act provides that:

> The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include . . . any State or political subdivision thereof . . . 29 U.S.C. § 152(2) (emphasis added).

construction schedule, (3) increased costs to the MWRA in the event of delays caused by labor disputes, and (4) abating pollution of waters of the Commonwealth, namely the Boston Harbor. As the District Court found, events in the early stages of construction already had proven the need for labor peace and the potential for disruption of the project in the event of labor disputes. (App. 74a-75a).

The First Circuit's misapprehension of Gould has been echoed by a divided panel of the Eighth Circuit. See Glenwood Bridge, Inc. v. City of Minneapolis, 1991 U.S. App. Lexis 17422 (8th Cir. 1991). It is apparent that only a decision by this Court can establish the proper limits on the Gould doctrine.

3. The Court Should Grant Certiorari Now, Because The States Are Being Deprived of Their Sovereign Authority On Current Projects.

The injury to our federalist system effected by the First and Eighth Circuits has immediate and concrete consequences, which necessitate granting certiorari now. States and localities are losing their ability to safeguard their public trust on projects that are well underway, such as the Boston Harbor project. This injury cannot be remedied except by a decision from this Court. The "States are unable directly to remedy a judicial misapprehension of" Congressional intent regarding the federal-state balance. See Port Authority Trans-Hudson Corp. v. Feeney, 110 S.Ct. 1868, 1872 (1990) (discussing the Eleventh Amendment).

Unless the Court grants certiorari, the states and their subdivisions will be unable to respond effectively to the special conditions in the construction industry -- the very same conditions that led Congress to authorize project labor agreements on private construction projects:

> the short-term nature of employment, the impracticability of holding certification elections, the contractors' need for predictable cost and a steady supply of labor, and the longstanding custom of prehire bargaining in the industry . . .

App. 39a (Dissenting opinion of Breyer, C.J.), citing S. Rep. No. 187, 86th Cong., 1st Sess. 27-29 (1959).

The Boston Harbor Project, like many others across the nation, will not wait. Unless certiorari is granted now, many current public projects will be at a disadvantage compared to private

projects. States and their subdivisions will be unable to serve their public trust in the most effective fashion. Only a decision by this Court can return the authority over public projects where it belongs: in the hands of the public officials whose duty it is to serve the public and to carry out the wishes of the people's elected representatives.

CONCLUSION

This Court should grant the petitions for certiorari in Nos. 91-261 and 91-274.

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Date: September 12, 1991

DESCRIPTION OF INTEREST OF AMICI CURIAE

Both *Amici*, the National Constructors Association ("NCA") and Bechtel Corporation/Parsons Brinckerhoff, Quade & Douglas, Inc. ("Bechtel/Parsons") support the position of petitioners in these proceedings and submit that the decision of the U.S. Court of Appeals for the First Circuit in *Associated Builders v. Mass. Water Resources Auth.*, 955 F.2d 345 (1st Cir. 1991) should be reversed.

The NCA is a not-for-profit organization comprised of the nation's largest unionized construction companies.[1] NCA members continuously work on major construction projects across the country involving many billions of dollars. Along with constructing the nation's largest private sector projects, NCA members also regularly perform work on the nation's largest public construction projects sponsored by federal, state, and municipal authorities.

NCA member companies are all "employers engaged primarily in the building and construction industry" within the meaning of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* (the "NLRA"). As such, Congress has given NCA members important rights under Section 8(e) and (f) of the NLRA. *See* 29 U.S.C. §§ 158(e) and (f). NCA members regularly rely on these statutory rights in negotiating project labor agreements that require all contractors performing work on a single construction project to become bound by a single project agreement. These rights—as they apply to publicly-owned projects—have been effectively repealed by the decision below.

[1]NCA members include ABB-CE Services, Inc., ABB Lummus Construction Company, The Austin Company, Badger America Inc., Bechtel Construction Company, Oscar J. Boldt Construction Company, Ebasco Constructors, Inc., Fluor Constructors International Inc., Kiewit Industrial Co., Leonard Construction Company, Parsons Constructors, Inc., The Rust Engineering Company, Stone & Webster Engineering Corporation, UE&C Catalytic, Inc. and Wright Schuchart Harbor Co.

Bechtel/Parsons is a joint venture and is the Construction Manager retained by the Massachusetts Department of Public Works (the "MDPW") to manage its Central Artery/Third Harbor Tunnel Project (the "Artery Project"). The Artery Project is one of the largest and most complicated construction projects ever undertaken in this country. Its estimated cost will exceed four billion dollars and it will take approximately eight or more years to complete. The Artery Project will include major improvements and expansion of two interconnecting Interstate highway systems (I-90 and I-91); construction of an eight-to-ten lane underground expressway through downtown Boston; and construction of a four lane tunnel under Boston Harbor connecting the Massachusetts Turnpike and the Logan Airport road system. That three-quarters of the construction will take place underground in densely populated, urban areas adds to the complexity of this Project. So, too, does the fact that this construction must occur in and around existing mass transit systems that, due to existing congestion, cannot be taken out of service for any extended period of time during construction.

As Construction Manager of the Artery Project, Bechtel/Parsons serves in a role identical to that of petitioner Kaiser Engineers, Inc. ("Kaiser") on the Boston Harbor Project (the "Harbor Project"). Like Kaiser, Bechtel/Parsons conducted an analysis of the most cost-effective and efficient way to proceed with this project of unprecedented size and complexity. To ensure uniformity of work rules and to protect the project from strikes, picketing, and other disruptive and delaying effects of lawful labor disputes, Bechtel/Parsons (like Kaiser) negotiated a special labor stabilization, or project, agreement to cover all construction on the Artery Project site ("Artery Project Labor Agreement"). Similar to Kaiser's Harbor Project Labor Agreement, the Artery Project Labor Agreement requires that all contractors on the Project become bound by the agree-

ment,[2] recognize the signatory unions and utilize hiring halls. The MDPW, sponsor of the Artery Project, repeated this requirement in its bid specifications, just as the Massachusetts Water Resources Authority ("MWRA") repeated a similar requirement from Kaiser's Project Labor Agreement in its Bid Specification 13.1. Thus, the enforceability of both this core term of Bechtel/Parsons' Project Agreement and the implementing state bid specification are inextricably tied to the validity of the Harbor Project specification and the outcome of this proceeding.

The importance of project agreements to construction managers such as Bechtel/Parsons and other NCA members acting in that capacity cannot be over-emphasized. By requiring all contractors to be bound by a single labor contract, a project agreement ensures that various work rules and conditions on a single project site (for example, shift schedules, break times, travel times, holidays, etc.) are standardized, thereby eliminating the numerous conflicting practices of individual contractors (whether union or non-union) that otherwise would be in effect. Working around each contractor's own work rules would be next to impossible in the absence of this standardization. In addition, project agreements typically contain a binding grievance/arbitration procedure designed to resolve all work and jurisdictional disputes that inevitably occur when thousands of employees, employed by scores of different employers and represented by dozens of different unions, work side-by-side on the same construction project. The full advantage of these benefits can be secured only by requiring that all site contractors become subject to a single, master project labor agreement.

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[2]As a project agreement, this contract only applies to work performed on this particular project. Thus a contractor who becomes bound by this agreement need not recognize the union nor comply with the terms of the agreement at any other worksite.

But most importantly, project labor agreements—like the Harbor and Artery agreements—provide comprehensive no-strike protection, for the entire life of the project, against the costly delays and disruptions caused by lawful strikes and picketing. These agreements insulate the work of the project from strikes called by signatory unions against signatory contractors, regardless of whether the strike is related to the project. Consequently, regardless of labor strife in the world around the project, the project itself remains a strike-free zone. To appreciate the significance of this no-strike pledge on the Harbor and Artery Projects, the Court need only consider that there are approximately two dozen different building trade unions in the Boston area. Each union typically is party to a two- or three-year agreement with contractors working within its trade and geographic jurisdiction. Because approximately 75% of all major construction in the Boston area typically is performed by union contractors, the majority of contractors on the Harbor or Artery Projects would be party to one of these 24 agreements even in the absence of this requirement in the Project Labor Agreements. *Utility Contractors Ass'n of New England, Inc. v. The Comm'rs of The MDPW*, No. 90-3035, slip. op. at 1-2 (Mass. Super. Ct. August 2, 1990). With as many as 24 different contracts expiring every two or three years over the anticipated eight-year duration of the project, there could be between 50 and 100 separate negotiations for new collective bargaining agreements occurring among the contractor workforce. *Id.* Any one of these negotiations could result in a lawful strike seriously delaying the completion of either the Artery or Harbor Projects.

A comprehensive no-strike clause, like those contained in the Harbor and Artery Project Labor Agreements, protects against this possibility by preventing these strikes from impacting the project site. Of course, just as the proverbial chain is only as strong as its weakest link, a construction project's protection

from lawful strikes is only as strong as the coverage of this no-strike clause is broad. Even a single union engaged in a lawful strike against a single contractor on a construction project is often capable of bringing the entire project to a standstill. Meaningful no-strike protection for a project can only be secured by ensuring that the no-strike clause extends to *all* project contractors; this, in turn, can be accomplished only by requiring that all contractors on the site become bound by a project labor agreement.

The decision below prevents Kaiser (as well as the Commonwealth of Massachusetts) from reaping these benefits of its Project Labor Agreement because it prevents enforcement of the requirement that all contractors on the Project become bound by the Agreement. Although the court literally found that the Kaiser Agreement, including this specific requirement, was "lawful," it held that the Commonwealth's effort at enforcing this requirement by repeating it in Bid Specification 13.1 was unlawful. Yet, without this Bid Specification, there is no mechanism for implementing Kaiser's contract.

If the First Circuit's decision is left undisturbed, Bechtel/Parsons' Project Agreement on the Artery Project will be impacted similarly, as will the right of all NCA members to use Section 8(e) and 8(f) labor agreements on future public construction projects. The potential impact of this decision is extremely significant. In 1990, publicly-owned projects accounted for approximately 25% of all new construction in this country, with an aggregate value in excess of $109 billion. U.S. Department of Commerce, International Trade Administration, *Construction Review, A Bimonthly Industry Report*, at pp. 1 and 7 (March/April 1991). As America's infrastructure undergoes essential reconstruction in the coming years, public projects will take on even greater importance. And, project

labor agreements designed to ensure labor stability and timely project completion will have an even greater value.

Prehire project agreements that require all contractors to become bound by their terms are a way of life in the construction industry. The Court has already been provided an impressive, albeit incomplete, listing of public construction projects on which project agreements, like the one in issue here, have been used. *See* Brief of the Building and Construction Trades Council of the Metropolitan District in Support of Its Petition for a Writ of Certiorari at 12-13, n.5. These agreements are used for three basic reasons:

> (1) they promote cost effective, efficient and timely completion of construction projects;
>
> (2) they offer the only means for protecting a project from strikes; and
>
> (3) they have always been considered by both employers and unions to be as lawful and fully enforceable on public projects as on private construction sites.

As the states are confronted with the enormous task of rebuilding our nation's roads and bridges, it is critical that their projects not be denied the benefits and protections of Section 8(e) and (f) that are available on all privately owned construction sites.

SUMMARY OF ARGUMENT

In a misapplication of federal preemption principles, the First Circuit invalidated Massachusetts Bid Specification 13.1 because, in that court's view, the Specification constituted a

"pervasive intrusion" by the Commonwealth into the collective bargaining process of project contractors. 935 F.2d at 353.[3] Bid Specification 13.1, however, merely repeated a lawful contractual provision, earlier negotiated between Kaiser and the Building and Construction Trades Council of the Metropolitan District (the "Union"), which required all project contractors to become bound by the Project Labor Agreement. While this *contractual* requirement did "intrude" into the collective bargaining process of other contractors, it did so in a manner contemplated—and, indeed, expressly authorized—by Congress under Section 8(e) and (f) of the NLRA. The Commonwealth's repetition of this requirement in Bid Specification 13.1 represents no additional intrusion into the bargaining process and, therefore, should not be preempted.

Moreover, the First Circuit's conclusion defeats the very objective of federal preemption. This decision empowers individual states to establish statutory schemes that effectively preclude private contractors on public projects from utilizing rights granted them under Section 8(e) and (f). In so doing, the court's decision not only permits truly pervasive intrusion into the bargaining process by the states, but it also denies the primary goal of federal labor law preemption; namely, ensuring the uniform application of federal labor laws. To avoid this result, the decision below must be either reversed or—at the other extreme—carried one step further so as to invalidate those provisions of the Massachusetts Bidding Law that

[3]There are two principal preemption analyses applicable in labor cases. Under this Court's ruling in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), states are prohibited from regulating conduct arguably protected by Section 7 or prohibited by Section 8 of the NLRA. States are also prohibited from regulating those activities which Congress intended to be left unregulated under the Court's holding in *Lodge 76, Machinists v. Wisconsin Employment Relations Comm'n.*, 427 U.S. 132 (1976). It is this latter *Machinists* doctrine that is implicated in this case.

required the Commonwealth to issue Bid Specification 13.1 initially.

ARGUMENT

POINT I

CONTRARY TO THE GOAL OF THE PREEMPTION DOCTRINE, THE DECISION BELOW ACTUALLY PROMOTES STATE INTERFERENCE WITH FEDERALLY PROTECTED RIGHTS

The focus of both the court below and the parties to this case has been on a state's right to secure the indirect benefits of prehire agreements on publicly-owned projects. While the *Amici* agree with petitioners that states should not be deprived of this right, there are even more fundamental and explicit rights that are denied by the lower court decision—federal statutory rights accorded to private employers in the construction industry, such as Kaiser, Bechtel and other NCA members. These rights have been effectively repealed.

As explained below, the NLRA explicitly authorized Kaiser to enter into its Project Labor Agreement. In fact, the provision of the Agreement that respondents find most offensive—the requirement that all project contractors become bound by the Project Labor Agreement—is specifically sanctioned by the NLRA. Yet the First Circuit held that because peculiar state bidding laws required the Commonwealth to repeat this contractual provision in Bid Specification 13.1, Kaiser could not enforce its federally protected labor contract. Consequently, this decision does not protect federal labor law rights, but rather it permits state law, in the form of the Commonwealth's public bidding requirements, to eliminate federal labor law rights, a result antithetical to preemption principles.

A. The Private Project Labor Agreement That Gave Rise to Bid Specification 13.1 Is Explicitly Authorized by the NLRA

Recognizing the unique needs of the construction industry, Congress amended the NLRA in 1959 to add Section 8(f) and modify Section 8(e). Section 8(f) explicitly permits employers in the construction industry—but no other employers—to enter into collective bargaining agreements providing for union recognition, compulsory union dues or equivalents, and mandatory use of union hiring halls, before the first employee is even hired for a project. *NLRB v. Local 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335 (1978); *Local 100, United Ass'n of Journeyman and Apprentices v. Borden*, 373 U.S. 690 (1963).

These labor agreements, known as "prehire" agreements, were sanctioned under Section 8(f) to protect the organizational and representational interests of construction unions and employees. Congress determined that construction industry employees could not rely effectively on traditional representational petitions and elections to unionize due to the temporary and sporadic nature of their employment. *See* S. Rep. No. 187, 86th Cong., 1st Sess. 55-56 (1959), *reprinted in* 1 *NLRB Legislative History of the Labor Management Reporting and Disclosure Act of 1959* at 451-52 ("Leg. Hist."); *John Deklewa & Sons*, 282 N.L.R.B. 1375 (1987), *enforced sub nom., Int'l Ass'n of Bridge Workers v. NLRB*, 843 F.2d 770 (3d Cir. 1988). By permitting prehire agreements, Congress intended to expand organizational and representational opportunities for construction employees.

Section 8(f) also was enacted to accommodate the unique needs of construction industry employers. Congress considered prehire agreements critical to the industry because contractors needed to know their labor costs in advance of bidding

on a project and they needed to be assured of access to a ready supply of skilled craftsmen (through the hiring hall) if they were awarded the job. H.R. Rep. No. 741, 86th Cong., 1st Sess. 19 (1959), *reprinted in* 1 Leg. Hist. 777. Congress concluded that the most appropriate way to achieve these objectives was to permit employers to enter into binding contracts in advance of actually securing work and, therefore, in advance of actually hiring employees.

Congress' accommodations to employees, unions and employers in the construction industry went beyond merely authorizing the prehire agreements. The 1959 amendment to Section 8(e) permits a general contractor's prehire agreement to lawfully require all other contractors performing work on that particular project site to become bound by the terms of that labor agreement. *See Woelke & Romero Framing, Inc.*, 456 U.S. 645, 657 (1982); *Connell Construction Co. v. Plumbers and Steamfitters Local 100*, 421 U.S. 616, 633 (1975). This practice was an essential part of the existing "pattern of collective bargaining" in the construction industry prior to 1959, and Congress intended to legitimize and preserve this practice through the construction industry provision of Section 8(e). *Woelke & Romero Framing*, 456 U.S. at 657. Congress permitted these "union signatory" clauses specifically to promote labor harmony and "to alleviate the frictions that may arise when union men work continuously alongside non-union men on the same construction site." *Connell*, 421 U.S. at 630 (*quoting Drivers Local 695 v. NLRB*, 361 F.2d 547 (D.C. Cir. 1966)).

The legislative history of Section 8(e) and (f) confirms that the same pattern of bargaining was found on public, as well as private, construction projects. In congressional hearings held in 1951 and 1959 to assess the need for accommodations to the construction industry, testimony described a bargaining pat-

tern for public works—the construction of dams, roadways and bridges—that was no different than that described for purely private projects. *See* Hearings on S.1973 Before the Subcommittee on Labor and Labor-Management Relations, 82d Cong., 1st. Sess. 27, 29, 31, 35, 39 and 45 ("1951 Hearings"); Labor-Management Reform Legislation: Hearings on S. 505, S. 748, S. 76, S. 1002, S. 1137, and S. 1311 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 86th Cong., 1st. Sess. (1959) ("1959 Hearings"); *See also* U.S. Department of Labor, Labor Management Services Administration, *The Bargaining Structure in Construction: Problems and Prospects* 14 (1980) ("Among the first project agreements designed to meet [the industry's] problems were those adopted during the construction of a portion of the Grand Coulee Dam in the state of Washington in 1937-38 and the Shasta Dam in California in 1940."). On both private and public projects, contractors and unions relied on prehire agreements, including agreements with restrictive contracting provisions, to meet their needs. *See Woelke & Romero Framing*, 456 U.S. at 658-59, n.11. And nowhere in this congressional discussion of the construction industry were distinctions drawn between private and public construction projects.

Nor does logic support any difference in the treatment of private and public projects. A construction industry employer's need to estimate its costs, and secure a ready supply of labor, and promote harmonious relations on the project site, as well as the employees' and unions' representational and organizational interests—all objectives served by Section 8(e) and (f)—do not differ depending on the public or private nature of the project's owner. *See Associated Builders v. Mass. Water Resources Auth.*, 935 F.2d at 364 (Breyer, C.J., dissenting).

Congress clearly understood that prehire agreements, complete with contracting restrictions, were a vital part of the public construction fabric in 1959. Consequently, its failure to restrict Section 8(e) and (f) to privately-owned construction sites must reflect an intent to preserve these arrangements on both public and private projects because their importance is universal to all construction. *See id.*; *Cf. Woelke & Romero Framing*, 456 U.S. at 658-59.[4]

Thus the very provision considered by respondents and the court below to be beyond the reach of state enforcement is explicitly sanctioned by the NLRA. Indeed, the First Circuit itself acknowledged that the Project Labor Agreement, with its requirement that all contractors become bound by its terms, "is a valid labor contract." 935 F.2d at 356. However, in a *non-sequitur* of monumental proportions, it proceeded to declare that conclusion "irrelevant." *Id.* at 357.

B. The Decision Below Incorrectly Applied Preemption Principles and Actually Grants States the Opportunity to Repeal Section 8(e) and (f) on Public Construction Sites

The First Circuit based its preemption conclusion on the fact that Bid Specification 13.1 repeated the Project Labor Agreement's lawful requirement that all site contractors must become bound by the Agreement. In the court's view, the imposition of this requirement by the Commonwealth constituted an impermissible intrusion into the collective bargaining

[4]The First Circuit's conclusion that this "deafening" silence must reflect an intent not to extend Section 8(e) and (f) rights to publicly-owned projects, *see* 935 F.2d at 357, fails to take into account the existing legislative scheme. As explained by Chief Judge Breyer in dissent, because the NLRA already excluded states from the scope of its coverage, there was no need to explicitly reference states in an exception to otherwise prohibited conduct under Section 8(e). *See* 935 F.2d at 364.

process of those contractors subject to Bid Specification 13.1. 935 F.2d at 353.

Significantly, on a privately owned project, this same requirement could be imposed without creating any issue of preemption because there would be no need for any state involvement. The contract between Kaiser and the Union, including the requirement that all site contractors become bound by the agreement, could be implemented simply by Kaiser's direct contracting authority, *i.e.*, its insistence that successful bidders for project work execute its project labor agreement if they wish to be awarded the work. *See Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 270 n.9 (1983). Even on those publicly-owned projects where the construction manager contracts *directly* with all major project contractors, and the municipal or state owner need not execute direct agreements with these contractors, the same project labor agreement requirement could be implemented by Kaiser's insistence that successful bidders comply with the project labor agreement. In both cases, there could be no question that the underlying project labor agreement, including the specific requirement that all other contractors on the site conform to the labor agreement would be lawful and enforcable under Section 8(e) and (f). *See id.*

In this case, the nature of the Harbor Project and the requirements of Massachusetts' bidding laws, required some Commonwealth involvement in the contract process. Specifically, state law compelled the Commonwealth to carry out the competitive bidding process itself and to directly contract with each entity performing major work on the site. *See* 935 F.2d at 364 (Breyer, C.J., dissenting) (citing Mass. Gen. L. Ch. 30, § 39M and Ch. 149 §§ 44A *et seq.*) Thus state law precluded the execution contracts from running directly between the successful bidder and the Project's Construction Manager, Kaiser.

Compliance with state law further required that the bid specifications issued by the Commonwealth recite the essential performance requirements for project contractors. This meant including in the specifications, among other things, the explicit requirement of Kaiser's Project Labor Agreement that all project contractors must become bound by that labor agreement. If this requirement were not included in the specifications, it could not be enforced on the Harbor Project.

1. *The Court Below Improperly Relied On The Form, Rather Than the Substance, of the State's Conduct*

A significant flaw in the lower court's analysis is that it improperly examined Bid Specification 13.1 in a vacuum. Having determined that the Kaiser labor agreement was valid but "irrelevant," the court thereafter ignored the existence of that agreement and focused on Bid Specification 13.1 as a stand-alone provision. Reading the specification literally, the court held that the

> state's intrusion into the bargaining process is pervasive. The state not only mandates that a labor agreement be reached before a bid is awarded, but dictates with whom that agreement is going to be entered, and specifies what its contents shall be.

935 F.2d at 353.

The focal point of federal preemption is the *substance* of the contested state regulation. Consequently, courts frequently have refused to permit the *form* of state action to dictate the results of preemption analysis. *See, e.g., Allis Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985) and *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614 n.5 (1986) ("*Golden State I*"). Yet that is precisely what the First Circuit

allowed to happen when it analyzed Bid Specification 13.1 apart from the Project Labor Agreement.

Taking Bid Specification 13.1 out of context, the lower court viewed it as a state-generated determination that project contractors must become bound by the Project Labor Agreement. In reality, the state did not independently mandate that a labor agreement be reached or with whom it be reached, nor did it dictate its contents. This so-called intrusion into the bargaining process of site contractors did not come from the state at all. It was Kaiser who substantively (and lawfully under Section 8(e) and (f)) mandated those things. The Commonwealth merely repeated Kaiser's contractual requirement in its Bid Specification. Had Kaiser's negotiated agreement contained different terms, then the state's Bid Specification would have reflected those different terms. The true extent of the state's "intrusion," then, consisted of no more than providing a mirror image of the agreement reached by two private parties—Kaiser and the Union—and did not affect any substantive aspect of the bargaining process, as is required to trigger *Machinists* preemption. *See Golden State I*, 475 U.S. at 616 (the *Machinists* doctrine precludes states from entering "into the substantive aspects of the bargaining process. . .")

Interestingly, in reaching its preemption conclusion the First Circuit took false comfort in this Court's observation that "states are therefore prohibited from imposing *additional* restrictions on economic weapons of self-help . . . unless such restrictions presumably were contemplated by Congress. . . ." 935 F.2d at 352 (*quoting Golden State I*, 475 U.S. at 614-15) (emphasis added). It is precisely because Bid Specification 13.1, as relevant here, is merely a matter of form, mirroring the privately negotiated restrictions of the labor contract, that the state has placed no *added* restrictions on anything.

2. *The Court Below Failed to Recognize That This So-Called "Intrusion," Regardless of Its Form, Is Permissible*

But even if Bid Specification 13.1 is considered a substantive intrusion by the state, it is not of a type prohibited by the preemption doctrine. Federal labor preemption exists, in part, to avoid state conflict with federal law. *See Wisconsin Dep't of Industry v. Gould Inc.*, 475 U.S. 282, 286 (1986). A critical consideration then, is whether the contested state conduct "frustrate[s] effective implementation of the Act's processes." *Golden State I*, 475 U.S. at 615 (*quoting Machinists* 427 U.S. at 147-48). It is readily apparent that the state action here—the Commonwealth's inclusion of the requirements of the Kaiser Project Labor Agreement in its Bid Specification—in no way conflicts with, or frustrates, federal labor policy. To the contrary, the alleged "wrong" of requiring all project contractors to become bound by this agreement regardless of their own labor policies is completely consistent with explicit federal labor policy. *See Woelke & Romero Framing*, 456 U.S. at 655-58, 663; *Jim McNeff*, 461 U.S. at 266-72, 270 n.9 (1983). Section 8(e) was purposefully enacted to allow the curtailment of individual contractor choice as a means of achieving work-site harmony. "Implicit in the construction industry proviso" of Section 8(e) is recognition that this curtailment and the contractor's acceptance of a union agreement is the *quid pro quo* for securing project work. *See id.*

Consistent with this federal policy, a similar requirement has been upheld on both a federal project where the requirement appeared in a project agreement negotiated by an agent of the federal government, *Phoenix Engineering, Inc. v. MK-Ferguson of Oak Ridge Co.*, Nos. 91-5527, 91-658, Slip Op., (6th Cir. 1992), and on a municipally owned project where the requirement had been added to the municipality's own preexisting collective bargaining agreement, *Associated Builders*

and Contractors v. City of Seward, No. 91-35511, Slip Op., (9th Cir. 1992). Thus, this requirement has been sustained when it has been contained in private project labor agreements for use on private projects and in public labor agreements for use on public projects. There is no sound reason to conclude, as the lower court did here, that when this same requirement is included in a private project labor agreement for use on a public project, as here, it is any less consistent with the NLRA[5]

By choosing to ignore the Project Labor Agreements' consistency with federal labor policy, the First Circuit created a *per se* rule of federal preemption: any and all state action that touches upon labor matters is preempted. This Court, however, has adopted a contrary rule that compels *Machinists* preemption only when the state has " '[entered] into the substantive aspects of the bargaining process *to an extent Congress has not countenanced.*' " *Golden State I*, 475 U.S. at 616 (*quoting Machinists*, 427 U.S. at 149) (emphasis added). Here, the state's conduct not only fails to impinge upon "substantive aspects of the bargaining process" (since it merely reflects the conduct of private contracting parties) but, in implementing Kaiser's Section 8(e) and (f) rights, it directly promotes the objectives Congress sought to achieve in enacting those statutory provisions.

A second, and related, purpose underlying the *Machinists* doctrine is to advance the congressional determination that some matters of labor policy are simply to be left unregulated, so that they may be controlled by "the free play of economic forces." *Id.* Bid Specification 13.1 does not, however, regulate any matter intended to be unregulated.

[5]Last year, the Eighth Circuit enjoined the City of Minneapolis from using a project agreement containing this type of requirement. *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367 (8th Cir. 1991). This split decision, which came on an appeal of a request for a preliminary injunction, relied heavily on the First Circuit's rationale in this case.

First, Bid Specification 13.1 does not "regulate" at all. This Specification does not even attempt to mandate issues of labor-management relations or collective bargaining in the state generally. It is, instead, a simple exercise of the state's *purchasing authority* as a private buyer of construction services. *See* 935 F.2d at 366 (Breyer, C.J., dissenting); *see also Associated Builders and Contractors v. City of Seward*, No. 91-35511, Slip Op. at 7. This Court has recognized in the analogous Commerce Clause context, "[w]hen the State acts solely as a market participant, no conflict between state *regulation* and federal regulatory authority can arise." *See id.* (*quoting United Building and Construction Trades Council of Camden County v. City of Camden*, 465 U.S. 208, 220 (1984)) (emphasis in original).

Building upon this concept, and the rationale expressed in Judge Breyer's dissent in the instant proceeding, the Sixth Circuit recently recognized that federal preemption does *not* preclude a federal agency from enforcing a project labor agreement containing a union signatory clause on one of its public construction projects. That court concluded that "government spending decisions pursuant to economic goals are not subject to preemption"; consequently, where the government agency is "acting as a purchaser in the marketplace, not as a regulator," the preemption doctrine simply is not applicable. *Phoenix Engineering, Inc.*, Nos. 91-5527, 91-658, Slip Op. at 23. Here, too, Bid Specification 13.1 only reflects Massachusetts' participation in the market, thereby avoiding any basis for federal preemption.

Moreover, even if the Commonwealth's limited involvement in implementing the Project Labor Agreement were deemed to be regulatory in nature, it is not unlawful regulation. Federal labor policy does not preclude state regulation of all labor-related matters; the thrust of *Machinists* preemption is to protect "conduct that Congress intended to be *unregu-*

lated." *Golden State I*, 475 U.S. at 614 (emphasis added). In other words, where Congress has made a determination that management and labor should be left to their own devices, *i.e.*, "to the free play of economic forces," the states cannot impose regulation that interferes with those devices. Congress, however, never intended prehire agreements and union signatory clauses in the construction industry to be "unregulated." To the contrary, Section 8(e) and (f) on its face reflects a congressional intent to heavily regulate in this area, and this Court's decisions in *Woelke & Romero Framing* and *Jim McNeff* provide ample recognition of this intent.

The Sixth Circuit's decision in *Phoenix Engineering* reaffirms this conclusion as well. In rejecting a similar *Machinists* attack on the union signatory clause contained in that federal project labor agreement, the court found that Congress not only did not intend prehire agreements to be "unregulated," but that it extensively regulated these agreements "by limiting their use to the construction industry, by denoting which elements prehire agreements may contain, and by permitting representation elections during the term of the collective bargaining agreement." *Phoenix Engineering*, Nos. 91-5527, 91-658, Slip Op. at 35. This regulation, in the Sixth Circuit's opinion, clearly distinguished prehire agreements from the collective bargaining conditions found to be unlawfully imposed in the *Golden State* and *Machinist* cases. Because Congress did regulate, and permit, the use of prehire agreements in the construction industry, the Sixth Circuit determined that *Machinist* preemption did not—indeed could not—preclude a federal agency from authorizing and enforcing the project labor agreement negotiated by its construction manager. That same rationale is fully applicable here and any purported state "regulation" of prehire agreements that does not frustrate federal labor policy is not preempted.

3. *The Court Below Failed to Adequately Protect Explicit Federal Rights and Instead Granted to the States a Vehicle for Repealing Section 8(e) and (f)*

Necessarily, and directly, flowing from the lower court's ruling (although never explicitly addressed by the First Circuit) is the fact that a core provision in Kaiser's Project Labor Agreement has been rendered unenforceable. Because Kaiser, as a matter of state law, cannot contract directly with major project contractors, it also cannot directly implement its requirement that all other contractors become bound by the Project Labor Agreement. The only available means of implementation available under these state-required contracting limitations is the Commonwealth's Bid Specification. By invalidating the Specification, the court has precluded Kaiser from enforcing the Harbor Project Labor Agreement and effectively eliminated Kaiser's express right to enter into such an agreement under Section 8(e) and (f).

Since this result is reached in the name of preemption, the unavoidable question is, what federal rights are being protected by the lower court's action? The First Circuit answered this question by pointing to the "right" of project contractors to determine issues of union recognition and contract content for themselves. However, as discussed at length earlier, contractors and subcontractors in the construction industry have no such "right" under the NLRA. The very objective of Congress in enacting Section 8(e) and (f) was to clarify that a general contractor, such as Kaiser, is authorized to dictate union recognition and contract content for *all* site contractors. Thus, the First Circuit has actually permitted the repeal of a general contractor's explicit federal rights in favor of the "rights" of lower tier contractors that Congress intentionally abandoned more than three decades ago. Ironically, the First Circuit did this in the name of "preserving" the federal statutory scheme.

But even more troubling is that the First Circuit's decision gives individual states the opportunity to determine for themselves whether this repeal of Section 8(e) and (f) will occur within their jurisdictions. In the labor arena, one of the principal objectives of preemption is to ensure a uniform, federal labor law. *See Amalgamated Ass'n of Street, etc. v. Lockridge*, 403 U.S. 274, 285-88 (1971); *Garner v. Teamsters, Chauffeurs and Helpers, etc.*, 346 U.S. 485, 490-91 (1953). Under the First Circuit's rationale, this objective is lost.

To quote dissenting Chief Judge Breyer, the First Circuit's holding creates the possibility of an "odd crazy-quilt of prehire practices." 935 F.2d at 364. Simply put, the preemption issue arose here because Massachusetts' bidding law required the state to contract directly with major project contractors (and prevented Kaiser from contracting with them) and required those contracts to be supported by bid specifications. In another jurisdiction, without required state involvement in the contracting process, there would be no preemption issue. Thus, depending upon the peculiar bidding law requirements imposed by various states and municipalities, what might be lawful in one location might well be unlawful, as "preempted," in another jurisdiction. Necessarily, then, whether Kaiser, and construction industry contractors like Kaiser, will have the opportunity to exercise Section 8(e) and (f) rights will not depend upon federal law, but rather will be determined by individual state or municipal laws. By enacting a bidding law or ordinance resembling the Massachusetts statute, any state or municipality could prevent contractors from effectively exercising Section 8(e) rights on public projects (or on some select public projects) within their jurisdiction. But it is precisely to avoid such an "odd crazy-quilt," in which issues of federal labor policy differ dramatically depending upon the peculiarities of a particular state's or municipality's laws, that the doctrine of federal labor preemption was created. *See Amalgamated Ass'n of Sheet*, 403 U.S. at 285-88; *Garner*, 346

U.S. at 490-91. Even the First Circuit observed that "congressional concern for a uniform, national labor policy as embodied in the NLRA" should not be subject to "secondary deference." 935 F.2d at 354.

The true irony, however, is that many of the Harbor (and Artery) Project's contractors likely will be confronted with a requirement that they comply with some union labor agreements even in the absence of the contested Bid Specification. Although Massachusetts' peculiar bidding laws require direct contracting between the Commonwealth and major contractors, those contractors in turn are permitted to contract directly with certain lower level subcontractors. To the extent any of those major contractors are union companies (as 75% or more are likely to be), and their individual, pre-existing labor agreements contain clauses that restrict subcontracting to employers who agree to become bound by those individual labor agreements (as virtually all do), the very "evil" the court below was determined to stop will nonetheless occur. Because it will be accomplished through a prehire agreement with a Section 8(e) union signatory clause, but without the support of a bid specification, this intrusion into the collective bargaining process of lower tier contractors will be immune from preemption attack. Thus, the uniformity demanded by federal labor policy will not even exist within the confines of this single Project, let alone across the nation.

POINT II

UNLESS REVERSED, THE FIRST CIRCUIT'S DECISION MUST RESULT IN THE PREEMPTION OF THE REMAINDER OF MASSACHUSETTS' PUBLIC BIDDING LAW

There is a significant impact of the First Circuit's decision that has been overlooked. If the decision below is affirmed,

then its preemption analysis must be taken one step further, resulting in the preemption of the remainder of Massachusetts' public bidding scheme.

There can be little question that if Massachusetts were to enact a law that explicitly prohibited construction industry employers from enforcing valid Section 8(e) and (f) agreements on public (or private) projects within the state, the law would be preempted because it would conflict with rights bestowed by federal law. The preemption doctrine, however, also prevents Massachusetts from enforcing a law that has that same effect, even if that is not its purpose. The First Circuit recognized as much in finding Bid Specification 13.1 preempted, noting that preemption analysis requires a court to look at the effect of a state law, regardless of its purpose, for to do otherwise would permit states a nearly unfettered right to nullify federal law. 935 F.2d at 354 (citing *Perez v. Campbell*, 402 U.S. 637 (1971)). What is significant, from a preemption perspective, is that the Massachusetts bidding law, as applied, conflicts with federal rights.

Prior to the First Circuit's decision, the fact that state law prevented Kaiser from contracting directly with lower tier contractors and required the state contracting authority to issue bid specifications as the means of implementing Kaiser's Project Labor Agreement posed no substantive interference with Kaiser's Section 8(e) and (f) rights. By following this state-mandated process, the necessary bid specification could be issued, making Kaiser's Project Labor Agreement fully enforceable. The impact of the First Circuit's ruling, however, is to prevent the issuance of this bid specification, while leaving intact the remainder of the Massachusetts bidding law that prevents Kaiser itself from implementing core portions of the Project Labor Agreement, *i.e.*, the requirement that all site contractors become bound by that Agreement. In the absence of Bid Specification 13.1, which is the piece that com-

pletes the enforcement circle, Kaiser's Section 8(e) and (f) rights are effectively eliminated.

This is exactly the result *Machinists* preemption was designed to avoid. This Court has described the "crucial inquiry regarding [*Machinists*] preemption" as whether "the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes." *Machinists*, 427 U.S. at 147-48. If the First Circuit's decision stands, then the remainder of Massachusetts' bidding law clearly "frustrates effective implementation" of Kaiser's Section 8(e) and (f) rights in that it prohibits Kaiser from enforcing its "union contracting" clause on the Harbor Project.

Within the framework established by the First Circuit, the only cure for this interference with Kaiser's explicit statutory rights is to recognize that the remainder of Massachusetts' bidding law is also preempted, thereby permitting Kaiser to enforce its Project Labor Agreement, in its entirety, even in the absence of its inclusion in any bid specification.

Of course, this necessary extension of the First Circuit's ruling, so that it also preempts the remainder of the bidding law, merely brings the Court to the same point it would be at if Bid Specification 13.1 were allowed to stand. The only difference is that the First Circuit's analysis requires invalidating a long-standing statutory public bidding scheme designed to protect the legitimate interests of the Commonwealth of Massachusetts. It is submitted that the proper application of the preemption doctrine allows this Court to preserve both Kaiser's rights and this legitimate state interest by recognizing the validity of Bid Specification 13.1.

CONCLUSION

For these reasons, it is respectfully submitted that the decision of the United States Court of Appeals for the First Circuit should be reversed.

Dated: July 22, 1992

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Nos. 91-261, 91-274

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In the Supreme Court of the United States

October Term, 1991

THE MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, et al.,
Petitioners,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., et al.,
Respondents.

CORRECTED COPY

On Writs of Certiorari to the
United States Court of Appeals for
The First Circuit

BRIEF OF AMICI CURIAE STATES OF MASSACHUSETTS, MICHIGAN, MINNESOTA, AND NEW JERSEY IN SUPPORT OF PETITIONERS

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ISSUE PRESENTED

Does the National Labor Relations Act clearly express an intent to preempt States and their subdivisions from using project labor agreements on their own public works projects even though Congress expressly authorized such agreements for the private construction industry?

UNITED STATES SUPREME COURT

Nos. 91-261, 91-274

THE MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, ET AL.

Petitioners,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/ RHODE ISLAND, INC., ET AL.,

Respondents.

BRIEF OF AMICI CURIAE STATES OF MASSACHUSETTS, MINNESOTA, NEW JERSEY

IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICI CURIAE

The States identified above submit this brief amici curiae to urge the Court to reverse the decision of the First Circuit. This brief emphasizes the practical difficulties and the federalism concerns inherent in

public construction and procurement. The amici argue that state and local agencies must be allowed flexibility over labor policy on their own public works projects, and that the National Labor Relations Act ("NLRA") does not preempt local control over such matters.

The amici are sovereign States that own and possess authority over public works projects within their jurisdictions. In addition to the project labor agreements on state and local projects in fourteen states, cited in the Trade Council's petition (No. 91-261), pp. 12-13, n.5 and in the MWRA's petition (No. 91-274), p. 12, the projects set forth in the margin have been completed under project labor

agreements.[1/] Based solely on Congressional silence, the reasoning of the majority opinion below precludes public entities, state or federal, from maintaining the flexibility with regard to public works projects that Congress

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[1/] In the Minneapolis-St. Paul metropolitan area, there have been dozens of recent public works projects that have been completed under project labor agreements, including the following: the Target Center in Minneapolis, the Hubert H. Humphrey Metrodome, the new University of Minnesota Hospital, the Minneapolis Waste-to-Energy Plant, the Minneapolis Convention Center, the Nicollet Mall Project, the Hennepin County Government Center, the St. Paul Civic Center, the Ramsey County Courthouse renovation, and the Seneca, Blue Lake and Empire waste-water treatment facilities. See also Utility Contractors Ass'n. v. Department of Public Works, 29 Mass. App. 726, 565 N.E.2d 459 (1991) ("UCANE") (unless the panel decision below is overturned or substantially modified, Massachusetts will not be able to use a project labor agreement on its Central Artery/Third Harbor Tunnel Project, a $4 billion (Footnote continued on next page.)

has unequivocally given to private property owners.

The States have strong interests in maintaining their ability to conduct public works projects with maximum efficiency through the various options available to private landowners, which include, among other things, project labor agreements. Such agreements may be particularly appropriate on complex projects that require coordinating tasks performed by many different kinds of labor over a long period of time.[2/]

(Footnote continued from previous page.) transportation project over an eight to ten year period).

2/ See UCANE, supra, 29 Mass. App. Ct. at 727, 565 N.E.2d at 460-461 ("such agreements are used to deal with the complexities of major construction projects and typically include standardization of working conditions and mechanisms for resolving disputes without interruption of work").

The States need the flexibility to choose project labor agreements where appropriate, in order to promote efficiency, predictability of cost and a steady and reliable supply of labor on public projects. These types of agreements can resolve jurisdictional disputes between trades in advance, provide for uniform or well-coordinated work rules and schedules, and prohibit strikes. In the absence of project labor agreements like those used in the private sector, many special and complex public works projects risk delays, cost overruns and inefficiencies that have adverse financial and programmatic impacts.

From the financial perspective, the costs of many public projects to the taxpayers and ratepayers are likely to increase unless the States can obtain

project labor agreements promoting labor harmony and, for example, precluding strikes. Contractors' bids are likely to go up, as the bidders take into account the increased risks of delay because of lack of coordination or strikes, as well as the effect of inflation over a longer period of time. Bids would likely reflect the prospect that necessary equipment would have to be rented for a longer period, or that money would have to be borrowed for longer, than would otherwise be necessary. The legal and other costs of dealing with the labor unrest itself would have to be considered. Later sub-bids on the same project may be increased, as they may be submitted at a later date, after additional inflation has occurred.

On a complex public works project, delays often have a compound effect. Particularly on a multi-million or multi-billion dollar project with a firm time schedule, like the Boston Harbor project, one delay may cause further delays if, for instance, a vital piece of special equipment has been leased for a certain time period, but then cannot be used because a strike prevents or delays the necessary preparatory work. If that equipment is in demand, and has been reserved for use elsewhere, it may not be available immediately after a strike is resolved. In addition, construction projects often require a complex sequence of tasks to be performed by one specialized trade after another. Unexpected strikes often destroy the complex scheduling arrangments made by project managers,

causing a chain reaction of delays and increased costs.

In the case of a court-ordered project, delays also involve the prospect of longer non-compliance with law and, from the defendants' perspective, court-ordered fines and penalties. The Boston Harbor project illustrates this danger well. Many other state construction projects designed to remedy violations of laws respecting prisons, mental health or retardation facilities and other programs could be subject to similar delay or exposure to fines or penalties for violation of court orders.

While increased costs to taxpayers and ratepayers are important, delays also directly affect the states' ability to bring needed services to their citizens. On an environmental

improvement project, like the Boston Harbor Cleanup, delays mean more pollution for a longer period of time. Delayed construction of roads and bridges means more traffic congestion, not only due to construction detours, but also because inadequate (or perhaps even dangerous) conditions continue in effect. A host of additional examples illustrate how the States' inability to control construction and to achieve efficiency can postpone the provision of public benefits, such as state-of-the-art hospitals, civic centers and other types of government buildings. The longer some of these projects take, the longer it will take for improved roads, or improved civic centers to have their intended beneficial effect on society and the economy.

The interest of the amici transcends any dispute over the particular content of the project labor agreement in this case. The amici seek to preserve the constitutional balance between the powers of the Federal Government and those of the States, as established by the Constitution. They seek to preserve the States' autonomy and their identities as independent repositories of sovereign authority within our federal system.

In sum, the amici view this case as an important test of their control over labor relations on state and local public works projects. A definitive affirmation of those powers in this case would preserve the constitutional balance of power between the States and the Federal Government and provide guidance to States who wish to exercise

their powers in accordance with principles of federalism.

FACTS

This case concerns a project labor agreement between the project manager on the Boston Harbor pollution abatement project, and the unions and contractors providing labor for the project. In particular, the dispute is over a bid specification known as Specification 13.1, which must be included in all bids for work on the Boston Harbor project. That specification provides that all contractors and subcontractors on the Boston Harbor Project must agree to abide by the project labor agreement signed by Kaiser Engineers, Inc. ("Kaiser") and the Building and Construction Trades Council("Master Labor Agreement").

As described in the District Court's opinion (App. pp. 75a-76a[3/], reproduced in the following paragraphs), the decision to use Specification 13.1 came about after discussions between the project owner, the Massachusetts Water Resources Authority ("MWRA") and the project manager, Kaiser:

"Kaiser, by virtue of its extensive experience on large construction projects and its dealings with hundreds of building trade unions, recognized and understood the need for labor peace and stability on a project of this magnitude. It was aware that the MWRA was operating under court-mandated milestones and it knew of the

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3/ For convenience, the amici cite consistently to the appendix of the MWRA's petition.

significant union presence in the Boston area. A major concern was the location of the work sites and the pressure points at which labor demonstrations could choke the movement of personnel and material. Accordingly, Kaiser recommended to the MWRA that it be permitted to negotiate with the building and construction trades unions, through the Council, in an effort to arrive at an agreement which would assure labor stability over the life of the project. Any agreement was subject to review and final approval of the MWRA.

"The MWRA accepted Kaiser's recommendations and in early May, 1989, negotiating teams from the unions and Kaiser met. The Agreement was the result of their negotiations . . .. [T]he MWRA Board of Directors, on May 28, 1989, adopted the Agreement as the

labor policy for the project and directed that Specification 13.1 be added to the bid specification for all new construction work. The purpose was to achieve jobsite labor harmony in order to maintain the court-ordered schedule and avoid the risk of substantial fines for non-compliance. In the absence of such an agreement, legitimate labor disagreements and demonstrations would lead to delays in construction, resulting in increased costs to the MWRA. And, of course, delays will mean that Boston Harbor would continue to be subjected to environmental abuse."

SUMMARY OF THE ARGUMENT

1. The States act as guardians and trustees for their citizens when they contract in their proprietary capacity for the building of public facilities.

In order to fulfill their trust, by providing public works projects in a timely, cost effective and efficient manner, the States have as much need as private landowners to enter into project labor agreements. Since project labor agreements are expressly lawful in the private construction industry, the States must share the same freedoms in their proprietary capacity.

While Congress may displace the States' authority in many areas through legislation, it must do so in a clear statement in the text of the statute itself. There is nothing approaching a clear statement that Congress has mandated intrusion into state sovereignty in this area. On the contrary, the National Labor Relations Act preserves the States' powers over labor relations on public works projects.

2. This Court's decision in Wisconsin Dept. of Industry, Labor & Human Relations v. Gould, 475 U.S. 282, 290 (1986), expressly recognizes that preemption may not apply where the State is responding to legitimate procurement constraints or to local economic needs, or where Congress intended to leave the task to the States. All three of these circumstances apply here. The majority opinion below therefore misapplied Gould in reaching its conclusion.

ARGUMENT

The majority opinion below reads into the National Labor Relations Act implied restrictions on labor relations on state and local government public works projects that do not apply to private projects. Congress has not expressed these restrictions expressly or even by necessary implication. On

the contrary, the NLRA authorizes the state action in question.

By finding preemption so readily here, the Court of Appeals violated the basic tenets of federalism that underlie our Constitution. Gregory v. Ashcroft, 111 S.Ct. 2395 (1991).

1. Congress Meant To Permit, Not To Prohibit, The Use Of Project Labor Agreements On State Projects.

The holding of the majority below wrests control over public construction projects from the States and their subdivisions. As a result, States, public authorities and municipalities have lost flexibility over labor relations on their public works projects. The effects of this lost flexibility are described above in the Interest of Amici section.

In this case, all of the interests at stake implicate the right of the people and their local representatives

to control local public works projects and to choose a labor policy that will best serve the public interest. The principles of federalism apply with full force to a state authority's proprietary interests on its own public works project. While state action is not per se lawful simply because the State is acting as proprietor, it would be contrary to fundamental principles of federalism to hold -- in the absence of any clear statement by Congress -- that a State, as proprietor, has fewer rights

than Congress has expressly given to private contractors.4/

In Reeves, Inc. v. Stake, 447 U.S. 429, 437, 439 (1980), the Court found

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4/ Most discussion regarding the States as proprietors, or as participants in the market, has occurred in the context of the dormant Commerce Clause. See Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976); Reeves, Inc. v. Stake, 447 U.S. 429 (1980); White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983); South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984). Cf. United Building & Construction Trades Council v. Mayor and Council of Camden, 465 U.S. 208 (1984) (privileges and immunities clause). It is true that these cases do not address the question of what the States may do, given enactment of the National Labor Relations Act. Wisconsin Dept. of Industry, Labor & Human Relations v. Gould, Inc., 475 U.S. 282, 290 (1986). Here, however, the NLRA does not withdraw state authority. Moreover, identifying the scope and purposes of the market participant doctrine sheds considerable light on the interests that are at stake here.

"no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market", and noted that "the competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis."

Reeves' articulation of the States' "role . . .'" as guardian and trustee for its people"'", 447 U.S. at 438, is instructive here.[5/] The MWRA's

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5/ Reeves was quoting Heim v. McCall, 239 U.S. 175 (1915). In fact, the full quotation from Heim is even more pertinent:

> . . . Atkin v. Kansas, 191 U.S. 207, 222, 223 . . . declared, and it was the principle of decision, that "it belongs to the State, as guardian and trustee for its people, and

(Footnote continued on next page.)

interests bear directly upon the efficient, expeditious and effective completion of the MWRA's sewerage treatment facilities themselves. The MWRA's goal of avoiding the costs of delay, in the form of increased construction costs, potential fines, and environmental harm, falls squarely within its duty to its ratepayers and to the voters to manage its property and purchasing policies so as to achieve the greatest benefit from the Harbor cleanup project at the least cost. It would be a breach of that public trust to subject

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(Footnote continued from previous page.)
having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of municipalities."

Heim, supra, 239 U.S. at 191.

the MWRA's ratepayers to the costs and risks of delay.

Without a compelling congressional direction, the Courts should not conclude that the otherwise lawful project labor agreement became unlawful because of the MWRA's involvement, which in turn arose only because of its strong proprietary interest in timely and cost-effective completion of its sewerage treatment facilities.

Ironically, the MWRA's interests here mirror the concerns that led Congress to authorize project labor agreements for landowners in private industry. As even the majority below acknowledged (App. 24a), Sections 8(e) and 8(f) of the National Labor Relations Act make the Master Labor Agreement "a valid labor contract." The rationale behind these sections applies to public,

as well as private construction, as Congress was concerned about the unique characteristics of the construction industry:

> the short-term nature of employment, the impracticability of holding certification elections, the contractors' need for predictable cost and a steady supply of labor, and the longstanding custom of prehire bargaining in the industry . . .

App. 39a (Dissenting opinion of Breyer, C.J.), citing S. Rep. No. 187, 86th Cong., 1st Sess. 27-29 (1959).

The MWRA, acting as proprietor of the construction site and of the sewerage facilities, should "share existing freedoms from federal constraints", Reeves, supra, 447 U.S. at 439, that are available to private parties under the NLRA. If MWRA is to share existing freedoms from federal constraints, then it must be allowed to choose clauses that were explicitly

authorized for private industry under sections 8(e) and 8(f) of the NLRA, 29 U.S.C. § 158(e),(f).

While Congress, acting under its constitutionally conferred powers, "may impose its will on the States," "[t]his is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly." Gregory, supra, 111 S.Ct. at 2400.

The majority opinion below intrudes into the States' "substantial sovereign authority", thereby depriving the people of the benefits of decentralized government that underlie the structure of our government:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen

> involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Id., 111 S.Ct. at 2399.

The majority opinion below subverts this constitutional scheme by departing from the rule that "'a clear and manifest purpose' of preemption is always required." Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 503 (1988) (emphasis added). See also Cipollone v. Liggett Group, Inc., 60 U.S.L.W. 4703, 4706-4707, ___ U.S. ___ (1992); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146-47 (1963) ("In other words, we are not to conclude that Congress legislated the ouster of [a state statute] . . . in the absence of an unambiguous congressional

mandate to that effect.") (emphasis added).

These considerations apply with full force to the NLRA challenge on the present facts. "The National Labor Relations Act leaves regulation of the labor relations of state and local governments to the States." Abood v. Detroit Bd. of Education, 431 U.S. 209, 223 (1977). The exemption of the States from the NLRA's definition of employer is strong evidence of congressional intent in this regard. 29 U.S.C. § 152(2).

There are "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." San Diego Bldg. Trades Council v.

Garmon, 359 U.S. 236, 244 (1959); See also Gould, supra, 475 U.S. at 291 ("legitimate response to state procurement constraints or to local economic needs . . ."). The cases demonstrate that the interests at stake here fall within this exception.

Nothing expressed or implied in the NLRA comes close to the type of Congressional statement that warrants preemption. Section 152(2) of Title 29 U.S.C. strongly supports the conclusion that preemption was not intended in the circumstances alleged by ABC. A private landowner in the construction industry has the benefit of Sections 8(e) and 8(f). A State or local agency using its own employees would be exempt from the NLRA under Section 2(2). The MWRA's requirement regarding Bid Specification

13.1 is limited to the "discrete, identifiable class of economic activity in which [it] is a major participant." White, supra, 460 U.S. at 211, n.7. It strains basic principles of federalism and logic to conclude that, without saying so, Congress intended to preempt the Agreement merely because a governmental party is involved.

2. The Gould And Golden State Cases Do Not Warrant Placing Restrictions Upon The States That Congress Has Not Clearly Mandated.

In order to justify its decision to place greater burdens upon governmental employers and developers than upon private companies, the majority below relied on Gould, supra and Golden State,

supra.[6/] Gould did not, however, establish the broad, judge-made preemption that the Court below seems to apply. Gould itself contained limits on the principle it announced, and those limits should be enforced in this case.

Indeed, this Court distinguished the present context from the one in Gould, supra, 475 U.S. at 291:

> We are not faced here with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs, or with a law that pursues a task Congress intended to leave to the States.

See also, Golden State Transit Corp. v. Los Angeles, 475 U.S. 608, 618, n.8

[6/] The First Circuit's misapprehension of Gould has been echoed by a divided panel of the Eighth Circuit. See Glenwood Bridge, Inc. v. City of Minneapolis, 940 F.2d 367 (8th Cir. 1991). The Sixth and Ninth Circuits have reached the opposite conclusion, as discussed below.

(1985). Instead of using its procurement role to effect a regulatory purpose, here, MWRA is using that role to achieve procurement goals, which fall within the exceptions stated in Gould. See Phoenix Engineering, Inc. v. M-K Ferguson of Oak Ridge Co., F.2d __, 1992 U.S. App. Lexis 13323 (6th Cir. Nos. 91-5577, 91-6358, June 11, 1992), slip. op. at 23-24; Associated Builders & Contractors, Inc. v. City of Seward, ___ F.2d __, 1992 U.S. App. Lexis 12519 (9th Cir. no. 91-35511, June 5, 1992), slip op. at 6323-6324 (upholding City of Seward's authority to require compliance with a project labor agreement under Gould, because of the city's "legitimate management concerns").

In the first place, Congress intended to allow the State to affect labor relations on state public works

projects funded by state agencies on state land. See U.S.C. § 152(2);[7] Abood, supra, 431 U.S. at 223; New York Tel. Co. v. New York State Dept. of Labor, 440 U.S. 519, 540-545 (1979).

Second, the District Court's findings regarding the origin of the labor provisions (App. 74a-76a) establish that the Agreement serves at least four important proprietary interests of the MWRA and the Commonwealth: (1) promoting labor peace and stability on the jobsite of a public

---

[7] The Act provides that:

> The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include . . . any State or political subdivision thereof . . . 29 U.S.C. § 152(2) (emphasis added).

works project owned by the MWRA, (2) avoiding the risk of substantial fines against the MWRA for non-compliance with the court-ordered construction schedule, (3) avoiding increased costs to the MWRA in the event of delays caused by labor disputes, and (4) abating pollution of waters of the Commonwealth. As the District Court found, events in the early stages of construction already had proven the need for labor peace and the potential for disruption of the project in the event of labor disputes (App. 74a-75a).

The First Circuit's misapplication of Gould cannot be justified, in light of these findings and the Court's opinion in Gould itself.

CONCLUSION

The injury to our federalist system

effected by the Court below has immediate and concrete consequences. As detailed above, in the Interest of Amici section, States and localities are losing their ability to safeguard their public trust on important public works projects such as the Boston Harbor cleanup. The "States are unable directly to remedy a judicial misapprehension of" Congressional intent regarding the federal-state balance. See Port Authority Trans-Hudson Corp. v. Feeney, 495 S.Ct. 299, 305 (1990) (discussing the Eleventh Amendment).

Unless the Court reverses the judgment below, the States and their subdivisions will be unable to respond effectively to the special conditions in the construction industry -- the very same conditions that led Congress to

authorize project labor agreements on private construction projects. See above, p. 24. Only by reversing the First Circuit's decision can the authority over public projects be returned where it belongs: in the hands of the public officials whose duty it is to serve the public and to carry out the wishes of the people's elected representatives.

This Court should reverse the First Circuit's decision, and remand with instructions to affirm the decision of the District Court.

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Nos. 91-261 & 91-274

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT,

Petitioner,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et alia*,

Respondents.

MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, INC.,

Petitioners,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et alia*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF *AMICUS CURIAE* OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., IN SUPPORT OF RESPONDENTS

September 1992

[Continued on inside cover]

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Nos. 91-261, 91-274

In the Supreme Court of the United States

October Term, 1991

THE MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, et al.,
Petitioners,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., et al.,
Respondents.

On Writs of Certiorari to the
United States Court of Appeals for
The First Circuit

BRIEF OF AMICI CURIAE STATES OF MASSACHUSETTS, MICHIGAN, MINNESOTA, AND NEW JERSEY IN SUPPORT OF PETITIONERS

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ISSUE PRESENTED

Does the National Labor Relations Act clearly express an intent to preempt States and their subdivisions from using project labor agreements on their own public works projects even though Congress expressly authorized such agreements for the private construction industry?

UNITED STATES SUPREME COURT

Nos. 91-261, 91-274

THE MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, ET AL.

Petitioners,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/ RHODE ISLAND, INC., ET AL.,

Respondents.

BRIEF OF AMICI CURIAE STATES OF MASSACHUSETTS, MINNESOTA, NEW JERSEY

IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICI CURIAE

The States identified above submit this brief amici curiae to urge the Court to reverse the decision of the First Circuit. This brief emphasizes the practical difficulties and the federalism concerns inherent in

public construction and procurement. The amici argue that state and local agencies must be allowed flexibility over labor policy on their own public works projects, and that the National Labor Relations Act ("NLRA") does not preempt local control over such matters.

The amici are sovereign States that own and possess authority over public works projects within their jurisdictions. In addition to the project labor agreements on state and local projects in fourteen states, cited in the Trade Council's petition (No. 91-261), pp. 12-13, n.5 and in the MWRA's petition (No. 91-274), p. 12, the projects set forth in the margin have been completed under project labor

agreements.[1/] Based solely on Congressional silence, the reasoning of the majority opinion below precludes public entities, state or federal, from maintaining the flexibility with regard to public works projects that Congress

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[1/] In the Minneapolis-St. Paul metropolitan area, there have been dozens of recent public works projects that have been completed under project labor agreements, including the following: the Target Center in Minneapolis, the Hubert H. Humphrey Metrodome, the new University of Minnesota Hospital, the Minneapolis Waste-to-Energy Plant, the Minneapolis Convention Center, the Nicollet Mall Project, the Hennepin County Government Center, the St. Paul Civic Center, the Ramsey County Courthouse renovation, and the Seneca, Blue Lake and Empire waste-water treatment facilities. See also Utility Contractors Ass'n. v. Department of Public Works, 29 Mass. App. 726, 565 N.E.2d 459 (1991) ("UCANE") (unless the panel decision below is overturned or substantially modified, Massachusetts will not be able to use a project labor agreement on its Central Artery/Third Harbor Tunnel Project, a $4 billion (Footnote continued on next page.)

has unequivocally given to private property owners.

The States have strong interests in maintaining their ability to conduct public works projects with maximum efficiency through the various options available to private landowners, which include, among other things, project labor agreements. Such agreements may be particularly appropriate on complex projects that require coordinating tasks performed by many different kinds of labor over a long period of time.[2/]

(Footnote continued from previous page.) transportation project over an eight to ten year period).

2/ See UCANE, supra, 29 Mass. App. Ct. at 727, 565 N.E.2d at 460-461 ("such agreements are used to deal with the complexities of major construction projects and typically include standardization of working conditions and mechanisms for resolving disputes without interruption of work").

The States need the flexibility to choose project labor agreements where appropriate, in order to promote efficiency, predictability of cost and a steady and reliable supply of labor on public projects. These types of agreements can resolve jurisdictional disputes between trades in advance, provide for uniform or well-coordinated work rules and schedules, and prohibit strikes. In the absence of project labor agreements like those used in the private sector, many special and complex public works projects risk delays, cost overruns and inefficiencies that have adverse financial and programmatic impacts.

From the financial perspective, the costs of many public projects to the taxpayers and ratepayers are likely to increase unless the States can obtain

project labor agreements promoting labor harmony and, for example, precluding strikes. Contractors' bids are likely to go up, as the bidders take into account the increased risks of delay because of lack of coordination or strikes, as well as the effect of inflation over a longer period of time. Bids would likely reflect the prospect that necessary equipment would have to be rented for a longer period, or that money would have to be borrowed for longer, than would otherwise be necessary. The legal and other costs of dealing with the labor unrest itself would have to be considered. Later sub-bids on the same project may be increased, as they may be submitted at a later date, after additional inflation has occurred.

On a complex public works project, delays often have a compound effect. Particularly on a multi-million or multi-billion dollar project with a firm time schedule, like the Boston Harbor project, one delay may cause further delays if, for instance, a vital piece of special equipment has been leased for a certain time period, but then cannot be used because a strike prevents or delays the necessary preparatory work. If that equipment is in demand, and has been reserved for use elsewhere, it may not be available immediately after a strike is resolved. In addition, construction projects often require a complex sequence of tasks to be performed by one specialized trade after another. Unexpected strikes often destroy the complex scheduling arrangments made by project managers,

causing a chain reaction of delays and increased costs.

In the case of a court-ordered project, delays also involve the prospect of longer non-compliance with law and, from the defendants' perspective, court-ordered fines and penalties. The Boston Harbor project illustrates this danger well. Many other state construction projects designed to remedy violations of laws respecting prisons, mental health or retardation facilities and other programs could be subject to similar delay or exposure to fines or penalties for violation of court orders.

While increased costs to taxpayers and ratepayers are important, delays also directly affect the states' ability to bring needed services to their citizens. On an environmental

improvement project, like the Boston Harbor Cleanup, delays mean more pollution for a longer period of time. Delayed construction of roads and bridges means more traffic congestion, not only due to construction detours, but also because inadequate (or perhaps even dangerous) conditions continue in effect. A host of additional examples illustrate how the States' inability to control construction and to achieve efficiency can postpone the provision of public benefits, such as state-of-the-art hospitals, civic centers and other types of government buildings. The longer some of these projects take, the longer it will take for improved roads, or improved civic centers to have their intended beneficial effect on society and the economy.

The interest of the amici transcends any dispute over the particular content of the project labor agreement in this case. The amici seek to preserve the constitutional balance between the powers of the Federal Government and those of the States, as established by the Constitution. They seek to preserve the States' autonomy and their identities as independent repositories of sovereign authority within our federal system.

In sum, the amici view this case as an important test of their control over labor relations on state and local public works projects. A definitive affirmation of those powers in this case would preserve the constitutional balance of power between the States and the Federal Government and provide guidance to States who wish to exercise

their powers in accordance with principles of federalism.

FACTS

This case concerns a project labor agreement between the project manager on the Boston Harbor pollution abatement project, and the unions and contractors providing labor for the project. In particular, the dispute is over a bid specification known as Specification 13.1, which must be included in all bids for work on the Boston Harbor project. That specification provides that all contractors and subcontractors on the Boston Harbor Project must agree to abide by the project labor agreement signed by Kaiser Engineers, Inc. ("Kaiser") and the Building and Construction Trades Council("Master Labor Agreement").

As described in the District Court's opinion (App. pp. 75a-76a[3/], reproduced in the following paragraphs), the decision to use Specification 13.1 came about after discussions between the project owner, the Massachusetts Water Resources Authority ("MWRA") and the project manager, Kaiser:

"Kaiser, by virtue of its extensive experience on large construction projects and its dealings with hundreds of building trade unions, recognized and understood the need for labor peace and stability on a project of this magnitude. It was aware that the MWRA was operating under court-mandated milestones and it knew of the

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3/ For convenience, the amici cite consistently to the appendix of the MWRA's petition.

significant union presence in the Boston area. A major concern was the location of the work sites and the pressure points at which labor demonstrations could choke the movement of personnel and material. Accordingly, Kaiser recommended to the MWRA that it be permitted to negotiate with the building and construction trades unions, through the Council, in an effort to arrive at an agreement which would assure labor stability over the life of the project. Any agreement was subject to review and final approval of the MWRA.

"The MWRA accepted Kaiser's recommendations and in early May, 1989, negotiating teams from the unions and Kaiser met. The Agreement was the result of their negotiations . . .. [T]he MWRA Board of Directors, on May 28, 1989, adopted the Agreement as the

labor policy for the project and directed that Specification 13.1 be added to the bid specification for all new construction work. The purpose was to achieve jobsite labor harmony in order to maintain the court-ordered schedule and avoid the risk of substantial fines for non-compliance. In the absence of such an agreement, legitimate labor disagreements and demonstrations would lead to delays in construction, resulting in increased costs to the MWRA. And, of course, delays will mean that Boston Harbor would continue to be subjected to environmental abuse."

SUMMARY OF THE ARGUMENT

1. The States act as guardians and trustees for their citizens when they contract in their proprietary capacity for the building of public facilities.

In order to fulfill their trust, by providing public works projects in a timely, cost effective and efficient manner, the States have as much need as private landowners to enter into project labor agreements. Since project labor agreements are expressly lawful in the private construction industry, the States must share the same freedoms in their proprietary capacity.

While Congress may displace the States' authority in many areas through legislation, it must do so in a clear statement in the text of the statute itself. There is nothing approaching a clear statement that Congress has mandated intrusion into state sovereignty in this area. On the contrary, the National Labor Relations Act preserves the States' powers over labor relations on public works projects.

2. This Court's decision in Wisconsin Dept. of Industry, Labor & Human Relations v. Gould, 475 U.S. 282, 290 (1986), expressly recognizes that preemption may not apply where the State is responding to legitimate procurement constraints or to local economic needs, or where Congress intended to leave the task to the States. All three of these circumstances apply here. The majority opinion below therefore misapplied Gould in reaching its conclusion.

ARGUMENT

The majority opinion below reads into the National Labor Relations Act implied restrictions on labor relations on state and local government public works projects that do not apply to private projects. Congress has not expressed these restrictions expressly or even by necessary implication. On

the contrary, the NLRA authorizes the state action in question.

By finding preemption so readily here, the Court of Appeals violated the basic tenets of federalism that underlie our Constitution. Gregory v. Ashcroft, 111 S.Ct. 2395 (1991).

1. Congress Meant To Permit, Not To Prohibit, The Use Of Project Labor Agreements On State Projects.

The holding of the majority below wrests control over public construction projects from the States and their subdivisions. As a result, States, public authorities and municipalities have lost flexibility over labor relations on their public works projects. The effects of this lost flexibility are described above in the Interest of Amici section.

In this case, all of the interests at stake implicate the right of the people and their local representatives

to control local public works projects and to choose a labor policy that will best serve the public interest. The principles of federalism apply with full force to a state authority's proprietary interests on its own public works project. While state action is not per se lawful simply because the State is acting as proprietor, it would be contrary to fundamental principles of federalism to hold -- in the absence of any clear statement by Congress -- that a State, as proprietor, has fewer rights

than Congress has expressly given to private contractors. 4/

In Reeves, Inc. v. Stake, 447 U.S. 429, 437, 439 (1980), the Court found

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4/ Most discussion regarding the States as proprietors, or as participants in the market, has occurred in the context of the dormant Commerce Clause. See Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976); Reeves, Inc. v. Stake, 447 U.S. 429 (1980); White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983); South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984). Cf. United Building & Construction Trades Council v. Mayor and Council of Camden, 465 U.S. 208 (1984) (privileges and immunities clause). It is true that these cases do not address the question of what the States may do, given enactment of the National Labor Relations Act. Wisconsin Dept. of Industry, Labor & Human Relations v. Gould, Inc., 475 U.S. 282, 290 (1986). Here, however, the NLRA does not withdraw state authority. Moreover, identifying the scope and purposes of the market participant doctrine sheds considerable light on the interests that are at stake here.

"no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market", and noted that "the competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis."

Reeves' articulation of the States' "role . . .'" as guardian and trustee for its people"'", 447 U.S. at 438, is instructive here.[5/] The MWRA's

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5/ Reeves was quoting Heim v. McCall, 239 U.S. 175 (1915). In fact, the full quotation from Heim is even more pertinent:

> . . . Atkin v. Kansas, 191 U.S. 207, 222, 223 . . . declared, and it was the principle of decision, that "it belongs to the State, as guardian and trustee for its people, and

(Footnote continued on next page.)

interests bear directly upon the efficient, expeditious and effective completion of the MWRA's sewerage treatment facilities themselves. The MWRA's goal of avoiding the costs of delay, in the form of increased construction costs, potential fines, and environmental harm, falls squarely within its duty to its ratepayers and to the voters to manage its property and purchasing policies so as to achieve the greatest benefit from the Harbor cleanup project at the least cost. It would be a breach of that public trust to subject

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(Footnote continued from previous page.)
having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of municipalities."

Heim, supra, 239 U.S. at 191.

the MWRA's ratepayers to the costs and risks of delay.

Without a compelling congressional direction, the Courts should not conclude that the otherwise lawful project labor agreement became unlawful because of the MWRA's involvement, which in turn arose only because of its strong proprietary interest in timely and cost-effective completion of its sewerage treatment facilities.

Ironically, the MWRA's interests here mirror the concerns that led Congress to authorize project labor agreements for landowners in private industry. As even the majority below acknowledged (App. 24a), Sections 8(e) and 8(f) of the National Labor Relations Act make the Master Labor Agreement "a valid labor contract." The rationale behind these sections applies to public,

as well as private construction, as Congress was concerned about the unique characteristics of the construction industry:

> the short-term nature of employment, the impracticability of holding certification elections, the contractors' need for predictable cost and a steady supply of labor, and the longstanding custom of prehire bargaining in the industry . . .

App. 39a (Dissenting opinion of Breyer, C.J.), citing S. Rep. No. 187, 86th Cong., 1st Sess. 27-29 (1959).

The MWRA, acting as proprietor of the construction site and of the sewerage facilities, should "share existing freedoms from federal constraints", Reeves, supra, 447 U.S. at 439, that are available to private parties under the NLRA. If MWRA is to share existing freedoms from federal constraints, then it must be allowed to choose clauses that were explicitly

authorized for private industry under sections 8(e) and 8(f) of the NLRA, 29 U.S.C. § 158(e),(f).

While Congress, acting under its constitutionally conferred powers, "may impose its will on the States," "[t]his is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly." Gregory, supra, 111 S.Ct. at 2400.

The majority opinion below intrudes into the States' "substantial sovereign authority", thereby depriving the people of the benefits of decentralized government that underlie the structure of our government:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen

> involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Id., 111 S.Ct. at 2399.

The majority opinion below subverts this constitutional scheme by departing from the rule that "'a clear and manifest purpose' of preemption is always required." Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 503 (1988) (emphasis added). See also Cipollone v. Liggett Group, Inc., 60 U.S.L.W. 4703, 4706-4707, ___ U.S. ___ (1992); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146-47 (1963) ("In other words, we are not to conclude that Congress legislated the ouster of [a state statute] . . . in the absence of an unambiguous congressional

mandate to that effect.") (emphasis added).

These considerations apply with full force to the NLRA challenge on the present facts. "The National Labor Relations Act leaves regulation of the labor relations of state and local governments to the States." Abood v. Detroit Bd. of Education, 431 U.S. 209, 223 (1977). The exemption of the States from the NLRA's definition of employer is strong evidence of congressional intent in this regard. 29 U.S.C. § 152(2).

There are "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." San Diego Bldg. Trades Council v.

Garmon, 359 U.S. 236, 244 (1959); See also Gould, supra, 475 U.S. at 291 ("legitimate response to state procurement constraints or to local economic needs . . ."). The cases demonstrate that the interests at stake here fall within this exception.

Nothing expressed or implied in the NLRA comes close to the type of Congressional statement that warrants preemption. Section 152(2) of Title 29 U.S.C. strongly supports the conclusion that preemption was not intended in the circumstances alleged by ABC. A private landowner in the construction industry has the benefit of Sections 8(e) and 8(f). A State or local agency using its own employees would be exempt from the NLRA under Section 2(2). The MWRA's requirement regarding Bid Specification '13.1 is limited to the "discrete,

identifiable class of economic activity in which [it] is a major participant." White, supra, 460 U.S. at 211, n.7. It strains basic principles of federalism and logic to conclude that, without saying so, Congress intended to preempt the Agreement merely because a governmental party is involved.

2. The Gould And Golden State Cases Do Not Warrant Placing Restrictions Upon The States That Congress Has Not Clearly Mandated.

In order to justify its decision to place greater burdens upon governmental employers and developers than upon private companies, the majority below relied on Gould, supra and Golden State, supra.[6/] Gould did not, however,

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[6/]The First Circuit's misapprehension of Gould has been echoed by a divided panel
(Footnote continued on next page.)

establish the broad, judge-made preemption that the Court below seems to apply. Gould itself contained limits on the principle it announced, and those limits should be enforced in this case.

Indeed, this Court distinguished the present context from the one in Gould, supra, 475 U.S. at 291:

> We are not faced here with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs, or with a law that pursues a task Congress intended to leave to the States.

See also, Golden State Transit Corp. v. Los Angeles, 475 U.S. 608, 618, n.8 (1985). Instead of using its procurement role to effect a regulatory

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(Footnote continued from previous page.) of the Eighth Circuit. See Glenwood Bridge, Inc. v. City of Minneapolis, 940 F.2d 367 (8th Cir. 1991). The Sixth and Ninth Circuits have reached the opposite (Footnote continued on next page.)

establish the broad, judge-made preemption that the Court below seems to apply. Gould itself contained limits on the principle it announced, and those limits should be enforced in this case.

Indeed, this Court distinguished the present context from the one in Gould, supra, 475 U.S. at 291:

> We are not faced here with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs, or with a law that pursues a task Congress intended to leave to the States.

See also, Golden State Transit Corp. v. Los Angeles, 475 U.S. 608, 618, n.8 (1985). Instead of using its procurement role to effect a regulatory purpose, here, MWRA is using that role to achieve procurement goals, which fall within the exceptions stated in Gould. See Phoenix Engineering, Inc. v. M-K

Ferguson of Oak Ridge Co., F.2d __, 1992 U.S. App. Lexis 13323 (6th Cir. Nos. 91-5577, 91-6358, June 11, 1992), slip. op. at 23-24; Associated Builders & Contractors, Inc. v. City of Seward, ___ F.2d __, 1992 U.S. App. Lexis 12519 (9th Cir. no. 91-35511, June 5, 1992), slip op. at 6323-6324 (upholding City of Seward's authority to require compliance with a project labor agreement under Gould, because of the city's "legitimate management concerns").

In the first place, Congress intended to allow the State to affect labor relations on state public works

projects funded by state agencies on state land. See U.S.C. § 152(2);[7] Abood, supra, 431 U.S. at 223; New York Tel. Co. v. New York State Dept. of Labor, 440 U.S. 519, 540-545 (1979).

Second, the District Court's findings regarding the origin of the labor provisions (App. 74a-76a) establish that the Agreement serves at least four important proprietary interests of the MWRA and the Commonwealth: (1) promoting labor peace and stability on the jobsite of a public

---

[7] The Act provides that:

> The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include . . . any State or political subdivision thereof . . . 29 U.S.C. § 152(2) (emphasis added).

works project owned by the MWRA, (2) avoiding the risk of substantial fines against the MWRA for non-compliance with the court-ordered construction schedule, (3) avoiding increased costs to the MWRA in the event of delays caused by labor disputes, and (4) abating pollution of waters of the Commonwealth. As the District Court found, events in the early stages of construction already had proven the need for labor peace and the potential for disruption of the project in the event of labor disputes (App. 74a-75a).

The First Circuit's misapplication of Gould cannot be justified, in light of these findings and the Court's opinion in Gould itself.

CONCLUSION

The injury to our federalist system

effected by the Court below has immediate and concrete consequences. As detailed above, in the Interest of Amici section, States and localities are losing their ability to safeguard their public trust on important public works projects such as the Boston Harbor cleanup. The "States are unable directly to remedy a judicial misapprehension of" Congressional intent regarding the federal-state balance. See Port Authority Trans-Hudson Corp. v. Feeney, 495 S.Ct. 299, 305 (1990) (discussing the Eleventh Amendment).

Unless the Court reverses the judgment below, the States and their subdivisions will be unable to respond effectively to the special conditions in the construction industry -- the very same conditions that led Congress to

authorize project labor agreements on private construction projects. See above, p. 24. Only by reversing the First Circuit's decision can the authority over public projects be returned where it belongs: in the hands of the public officials whose duty it is to serve the public and to carry out the wishes of the people's elected representatives.

This Court should reverse the First Circuit's decision, and remand with instructions to affirm the decision of the District Court.

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OCTOBER TERM, 1991

No. 91-261

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT,
PETITIONER,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

No. 91-274

MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, INC.,
PETITIONERS,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.,

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

BRIEF FOR MAYOR RAYMOND L. FLYNN AND THE CITY OF BOSTON AS AMICUS CURIAE.

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BRIEF FOR MAYOR RAYMOND L. FLYNN AND THE CITY OF BOSTON AS AMICUS CURIAE.

Interest of Amicus Curiae.

This brief Amicus Curiae is filed pursuant to Rule 37 of the Rules of this Court on behalf of Mayor Raymond L. Flynn and the City of Boston, Massachusetts (City). The Mayor and

the City assert that the Court's ruling in this case would have a significant impact upon major construction projects within the City. Accordingly, the focus of this brief is to apprise the Court of the nature of such impact.

If the court of appeals decision is sustained, timely completion of construction projects within this City can no longer be ensured. When public construction is delayed, as a result of work stoppages, picketing, or strikes, the cost of such delay is borne by the taxpayer. Specifically, the City is forced to expend additional monies for project completion. These costs are then passed on to the residents and businesses of this City in the form of higher fees. Thus, the potential economic benefits to a city are often jeopardized where the project extends past its completion date. The utilization of Master Labor Agreements, however, increases the likelihood of meeting project deadlines, resulting in efficient spending of tax dollars. Such agreements also enable a city to plan and carry out transportation improvements and environmental projects in an effective manner.

Boston Harbor Clean-up Project.

The impact of this ruling upon the Boston Harbor Clean-up Project is enormous. This project is under a court ordered timeframe mandating that the harbor satisfy standards imposed by the Clean Water Act. *See United States* v. *Metropolitan District Comm'n*, 757 F. Supp. 121, 123 (D. Mass.), *aff'd*, 930 F.2d 132 (1st Cir. 1991). Delays in the implementation of this clean-up project affect the economic and environmental well-being of this City.

In Boston, the Boston Water and Sewer Commission (BWSC) functions as the retail purchaser of water on behalf of

the residents and businesses of Boston. The Massachusetts Water Resources Authority (MWRA) operates as the wholesaler and charges the BWSC for the cost of purification. Consequently, when the cost of purification increases, City residents incur a higher rate for water use.

In 1985, the average annual water bill for a family of four residing within this City was $135.00. That same family paid $570.00 for water in the year 1992. It is projected that by the year 2000, it will cost this family of four $1400.00 per year to supply water to its household. In fact, the MWRA's wholesale rates are expected to incur double digit increases every year between now and the year 2000. These figures put Boston well above the national average. More importantly, however, these projected figures are based upon the assumption that the clean-up of Boston harbor occurs within the court ordered timeframe.

The residents and businesses of Boston are already financially overburdened with the cost of the harbor clean-up. Any delays in this project increase the cost to the MWRA, which is passed on to the water users within this City. The City maintains that such additional cost will be significant given the fact that 35% of the MWRA's revenues are derived from this City. It would be unjust to require the people of this City to incur further financial responsibility, as a result of project delays, for the clean-up of the harbor.

The Harbor Clean-Up Project has already created significant improvements in water quality. Prior to 1990, Boston harbor beaches were periodically closed after heavy rainfalls, when sewer overflows are most prevalent. However, in 1990 and 1991, the harbor beaches came very close to meeting water quality standards for swimming. Additionally, upgrading of water quality ensures that the fishing industry will continue to prosper. These improvements are a sign of this project's positive effect upon the City's environment.

However, even though improvements are evident, the harbor is still in violation of clean water standards. As dictated by the consent decree, the timeliness of this project is critical. Allowing this clean-up to fall past the date of completion results in a further degredation of the environmental quality of the harbor. The long term effect to the harbor and ocean could be devastating.

Central Artery/Tunnel Project.

The City is also concerned that this ruling could affect the Central Artery/Tunnel Project (CA/T). This project is utilizing a Master Labor Agreement similar to the present case. Should this Court rule that such agreements are unenforceable, delays in this project would greatly impact the City's economy and transportation systems.

The Central Artery serves as the region's North and South road into the City and was originally designed to move 75,000 vehicles per day. Today, it carries over 190,000 vehicles every day, the equivalent of more trucks and cars per lane than any interstate in America. It is among the most congested and dangerous highways in the nation with an accident rate three times the state average. Currently, traffic jams occur on the artery eight to nine hours daily. It is projected that without this project, this gridlock will extend to fourteen hours daily by the year 2010.

CA/T, a 5.8 billion dollar project, will depress this artery below the City and create an additional harbor tunnel to the airport, thereby alleviating traffic congestion in and around the City. CA/T is expected to be completed by 1998.

Timely completion of this project ensures that transportation into the City will be significantly improved. This, in turn,

results in economic benefits to its businesses. Specifically, the current recession within the Commonwealth has resulted in a high office vacancy rate within the City. A faster commute may attract other companies to relocate their offices downtown.

Efficient transportation fosters tourism as well which would serve to revitalize the economic growth of this City. Specifically, the project will allow for the creation of additional parkland in the City, which will dramatically improve pedestrian access.

Additionally, CA/T has resulted in the awarding of 31 million dollars in construction contracts to local companies. Further, this project will result in the direct creation of 10,500 jobs. It is projected that CA/T will generate over 450 million in annual sales for the next ten years in the metropolitan area.

Continuation of the Master Labor Agreement in place for this project ensures that CA/T will not serve to impede existing transportation within the City. Timely completion of the various phases of this project is essential to ensure that transportation continues to flow smoothly throughout the project. Project delays will not allow for such coordination.

The majority of this project is eligible for federal construction monies. However, such funding is appropriated annually. Thus, it is conceivable that delays may jeopardize the amount awarded for a particular year. Further, due to the sagging economy, construction contracts can be awarded at a lower cost right now. However, as the economy turns around, such prices will no longer be realistic. Thus, the cost of delays will increase at more than the rate of inflation.

This City badly needs the economic boost that this project will guarantee. Better transportation leads to more business, more tourism, and the creation of jobs. If the City cannot ensure a timely completion, delays will severely thwart the economic purposes of this project.

The City maintains that the court of appeals decision, holding that the National Labor Relations Act (NLRA) preempts the ability of a public entity to employ Master Labor Agreements, is in error. Therefore, the City urges the Court to reverse the judgment entered in this case by the United States Court of Appeals for the First Circuit.

Pursuant to Rule 37.5 of the Rules of this Court, consent to the filing of this brief is waived due to the City's status as a political subdivision of the Commonwealth of Massachusetts and its filing by the City's authorized law officer.

Statement of the Case.

The statement of the case as set forth in the Solicitor General's Amicus Brief is adopted by the City for purposes of this brief amicus curiae.

Summary of the Argument.

The City adopts the Solicitor General's arguments as stated in his amicus brief. Specifically, the City maintains that the use of Master Labor Agreements by state and local entities is not preempted by the NLRA. Preemption can be implied where there is direct regulation of labor relations by a governmental entity. However, the use of such agreements does not constitute such regulation. Rather, the public entity is merely exercising a proprietary right to mandate that contracts relating to a massive construction project conform to certain labor standards, grievance procedures, and no-strike requirements.

Argument.

The City adopts the arguments as presented by the Solicitor General in his amicus brief and highlights the salient points of such arguments.

I. The Use of Master Agreements in Public Construction Contracts Does Not Conflict With the Congressional Intention That Certain Labor-Related Conduct Remain Unregulated.

The *Machinist* preemption doctrine is applied where the activity in question is neither prohibited nor protected under the NLRA. *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). The inquiry delineated by this doctrine requires an analysis of the legislative intent behind the NLRA. Specifically, the court must determine whether the state's activity conflicts with the NLRA's purpose in ensuring that certain labor-related conduct remain "unregulated" and left to "the free play of economic forces." *Machinist*, 427 U.S. at 140; *see also Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608 (1986) (*Golden State I*); *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103 (1989) (*Golden State II*) (focusing such inquiry on whether the state has entered into substantive aspects of the bargaining process to an extent not countenanced by Congress).

Sections 8(e) and 8(f) of the NLRA evidences Congressional approval of Master Labor Agreements. National Labor Relations Act, 29 U.S.C. 151(e)(f). By virtue of these sections, private construction contractors can require that employees abide by collective bargaining agreements, regardless of the potential impact upon the free play of economic forces. Thus, since Congress has expressly authorized the use of such agree-

ments there is no conflict with federal labor relations policy. Accordingly, under the *Machinist* doctrine, there is no implied preemption with respect to the Master Labor Agreement in question.

Conclusion.

Public construction contracts constitute a core function of state and local government. Master Labor Agreements ensure timely completion of such projects. Thus, such agreements offer a valid mechanism for the efficient spending of public monies.

Because the impact of this decision would hinder the economic and environmental well-being of this City, we urge this Court to reverse the United States Court of Appeals for the First Circuit's decision.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief of Amici Curiae National Constructors Association and Bechtel Corporation/Parsons Brinckerhoff, Quade & Douglas, Inc.

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(S2211—LC6-772—1992)

CONSENT OF THE PARTIES

Counsel of record for all petitioners and respondents have consented to the filing of this amici brief and their written consent is filed herewith.

QUESTION PRESENTED

Whether federal labor law preemption forecloses a state authority, acting as the owner of a construction project, from implementing a prehire collective bargaining agreement as expressly authorized by the NLRA and negotiated by private parties.

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INTRODUCTION

Pursuant to Rule 37.3 of the Rules of this Court, the National Right to Work Legal Defense Foundation, Inc. ("Foundation") files this brief *amicus curiae* in support of respondents. All of the parties have consented to the filing of this brief; and their letters of consent have been filed with the Court.

INTEREST OF THE *AMICUS CURIAE*

The Foundation is a nonprofit, charitable organization that provides free legal assistance to individual employees who, as a consequence of compulsory unionism, have suffered violations of their right to work; freedoms of association, speech, and religion; rights to due process of law; and other fundamental liberties and rights guaranteed by the Constitution and laws of the United States and of the several States.

The Foundation has supported the most recent of this Court's major cases involving the rights of employees to refrain from joining or supporting labor organizations as a condition of employment.[1] In hundreds of other cases throughout the country, the Foundation is now aiding employees who seek to limit their forced associations with unions.

The Foundation is concerned with the cases here for review, because the Project Labor Agreement ("PLA") and Bid Specification 13.1 ("BS 13.1") of petitioner Massachusetts Water Resources Authority ("MWRA"), if sustained, would impose the primary badges and incidents of compulsory unionism—exclusive union representation and the mandatory payment of union dues

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[1] Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Ellis v. BRAC, 466 U.S. 435 (1984); Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271 (1984); Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986); Communications Workers v. Beck, 487 U.S. 735 (1988); and Lehnert v. Ferris Faculty Ass'n, __U.S.__, 111 S. Ct. 1950 (1991).

and fees—on every nonunion construction worker employed on the Boston Harbor Project, in violation of those workers' rights under both the National Labor Relations Act ("NLRA") and the Constitution of the United States. The Foundation presumes that respondents will adequately present the position of the nonunion *contractors* aggrieved by the PLA and BS 13.1, but remains concerned that, without its participation as *amicus curiae*, this Court will be denied the opportunity to view the issues from the special perspective of the nonunion *employees* involved, as well. All too often, situations involving compulsory unionism appear superficially as struggles between the impersonal collectives "labor" and "management", when closer inspection reveals that the vital interests of real people are at stake, too. The Foundation's brief *amicus* focusses on these interests.

SUMMARY OF THE ARGUMENT

This Court should affirm the judgment of the Court of Appeals for two reasons. *First*, as the undeniable products of the MWRA's *governmental* action, BS 13.1 and the PLA it enforces improperly condition the awards of public construction contracts on the surrender by nonunion employers and employees of their federal statutory *and constitutional* rights to operate and work on a nonunion basis. Thus, BS 13.1 offends the Constitution, not only under the doctrine of pre-emption (as the Court of Appeals rightly held),[2] but also as an affirmative violation of the constitutional rights of nonunion employers and employees to contract for employment on their own terms,[3] and to refuse to associate with unions.[4]

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[2] U.S. Const. art. VI, cl. 2.

[3] *See* Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 251 (1917) (due-process right).

[4] *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (First-Amendment right).

Second, because of its nature as a *governmental* agency, the MWRA may not interpose NLRA § 8(f) as a purported license for BS 13.1 and the PLA, on the plea that it (the MWRA) is acting in a merely "proprietary" capacity. For § 8(f) creates or recognizes no rights for *governmental* entities to impose compulsory unionism on private parties. And, in any event, in promulgating BS 13.1 the MWRA functioned not as a "proprietor" buying private services in a "free market" for the public's best advantage, but as a *regulator* discriminatorily promoting the economic interests of local unions by coercively substituting for "free-market" forces in the letting of public contracts a scheme of special political privileges.

ARGUMENT

Petitioners' fundamental error lies in their assertion that

> [r]ead as a whole, with particular attention to those of its provisions that distinguish the states from private parties, the NLRA embodies an intent that, when the states act as persons engaged in proprietary conduct for proprietary reasons, they should have, if anything, more freedom than private parties in matters affecting labor relations, not less.[5]

The error is threefold: *First*, although nothing in the NLRA prevents *private* purchasers from taking many proprietary actions,

> *government* occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints. Outside the area of Commerce Clause jurisprudence, it is far from unusual for federal law to prohibit States from making spending decisions in ways that are permissible for private parties. * * * The NLRA, moreover, has long been understood to protect a range of conduct against state but not private interference. * * *

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[5] Brief for Petitioners ("BP") at 19.

> The Act treats state action differently from private action not merely because they frequently take different forms, but also because in our system States simply are different from private parties and have a different role to play.[6]

Second, beyond the NLRA, the Constitution imposes on the States restrictions inapplicable to private parties.[7] *And third*, the mere label a State affixes to an exercise of power, or to the capacity in which it acts, cannot immunize its wrongful behavior from condemnation under either the NLRA or the Constitution.[8]

Therefore, extremely misleading is petitioners' insistence that the Court review this case from the perspective that,

> when the MWRA, acting in the role of purchaser of construction services, acts just like a private contractor would act, and conditions its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find, it does not "regulate" the workings of the market forces that Congress expected to find; it exemplifies them.[9]

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[6] Wisconsin Dep't of Industry, Labor & Human Relations v. Gould, Inc., 475 U.S. 282, 290 (1986) (emphasis supplied).

[7] *E.g.*, Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

[8] *NLRA: See* Wisconsin Dep't of Industry, Labor & Human Relations v. Gould, Inc., 475 U.S. 282, 287 (1986) (whether State's action "is an exercise of [its] spending power rather than its regulatory power" is "a distinction without a difference" where action conflicts with NLRA). *Constitution: See, e.g.*, City of Madison, Joint School Dist. No. 8 v. WERC, 429 U.S. 167, 173-74 & n.5 (1976).

[9] BP at 24, *quoting* Associated Builders & Contractors of Massachusetts/Rhode Island, Inc. v. Massachusetts Water Resources Auth., 935 F.2d 345, 361 (1st Cir. 1991) (Breyer, C.J., dissenting). Petitioners call this "the heart of the matter". BP at 24.

For petitioners carefully refrain from acknowledging the key distinctions that:

- Although in NLRA §§ 8(e) and 8(f) Congress authorized arrangements analogous to the PLA, *if* those arrangements derived from free collective bargaining between private parties subject to the workings of market forces, it never licensed the States to condition the privilege of private employers and their nonunionized employees to work under public contracts on the latters' forced acquiescence in such arrangements. And,

- Although the congressional acceptance of NLRA §§ 8(e) and 8(f) arrangements reflects a portion of the common-law freedom private employers, employees, and unions enjoyed prior to enactment of the NLRA to structure their contractual relationships as they saw fit, in BS 13.1 the MWRA purported to exercise a governmental power to discriminate in favor of compulsory unionism that the Constitution withholds.

These pivotal distinctions support the result reached by the Court of Appeals, albeit on broader, more fundamental grounds.

I. Bid Specification 13.1 conditions the receipt of a public benefit on the surrender by nonunion employers and employees of their federal statutory and constitutional rights to operate on a nonunion basis.

Viewed from the perspective that *governmental* action is involved, BS 13.1 self-evidently implicates the familiar "unconstitutional-conditions" doctrine: the MWRA has explicitly and unequivocally conditioned the award of a public benefit (a contract or subcontract on the Boston Harbor Project) on the surrender by nonunion employers and their employees of their

federal statutory and constitutional rights to operate on a nonunion basis.[10]

A. Pertinent here are the provisions of the PLA requiring that:

- nonunion employers must recognize petitioner Building and Construction Trades Council ("BCTC") as "the sole and exclusive bargaining representative of all craft employees working on facilities within the scope of th[e PLA]", thereby subordinating their nonunion employees to the BCTC in that capacity;[11] and

- nonunion employees "shall be subject to the union security provisions contained in the applicable Schedule A's and B's" of the PLA.[12]

Reference to the latter schedules exposes the true meaning of these "union security provisions":

> "*Section 2.* * * * All present employees who are not members of the Union and all employees who are hired hereafter for work * * * shall become and remain members in good standing by the payment of the required initiation fee and regular monthly dues * * * , and shall thereafter maintain such good dues standing for the term of this Agreement."

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[10] "[E]ach successful bidder and any and all level of subcontractors, as a condition of being awarded a contract or subcontract, will agree to abide by the provisions of the * * * [PLA] * * * , and will be bound by the provisions of that agreement in the same manner as any other provision of the contract." MWRA Pet. App. at 141a-42a.

[11] PLA art. III, § 1, *in* MWRA Pet. App. at 116a.

[12] PLA art. III, § 4, *in* MWRA Pet. App. at 117a.

- "*Section 1.* The Employer agrees that all employees * * * shall, as a condition of employment, become and remain members of the Union in good standing. No worker shall be refused admittance and the right to maintain membership in the Union provided he qualifies and complies with the Constitution and By-Laws of the Union.

  "*Section 2.* All workers employed by the Employer for a period of seven (7) days * * * within the unit * * * shall, as a condition of employment, tender the full and uniform admission fees in effect in the Union. All workers accepted into membership shall thereafter maintain their membership in good standing in the Union as a condition of employment."

- "The Employer agrees that it shall be a condition of continued employment for an employee to become and remain a member of the Union after seven (7) days of the signing of this Agreement or after seven (7) days after the commencement of his employment, whichever is later."

- "Subject to applicable law, all employees who are members of the Union in good standing * * * shall, as a condition of employment maintain their membership in the Union in good standing throughout the life of this Agreement. All other employees shall, subject to the laws and regulations of the Union, become members of the Union * * * and shall maintain their membership in the Union in good standing as a condition of employment."[13]

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[13] Building and Site Construction Agreement between Massachusetts Laborers' District Council and Associated General Contractors of Massachusetts, Inc., art. II, § 2; Agreement between Boston District Council of Carpenters Local Unions 33, 40, 67 and 218 and Associated General Contractors of Massachusetts, Inc., art. III, at 7; Agreement Between Bricklayers &

In effect, then, BS 13.1 imposes on nonunion employers as a condition of being awarded a contract or subcontract the requirements that they surrender their federal statutory rights under the NLRA to refuse to recognize and bargain collectively with a union not designated by a majority of their employees or certified by the National Labor Relations Board ("NLRB") after an election.[14] And it imposes on nonunion employees as a condition of being hired under such a contract or subcontract that they surrender their rights under the NLRA "to refrain from any or all [concerted] activities"[15]—in particular, their rights to avoid unwanted representation by a union[16] and inclusion in a "union-security" arrangement mandating the payment of fees to a union.[17]

Furthermore, BS 13.1 impinges on the constitutional rights of nonunion employers and employees to contract for employ-

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Allied Craftsmen District Council and Building Trades Employers' Association of Boston and Eastern Massachusetts, Inc., art. XII, § 1, at 13; *and* Agreement Between Boston Insulation Contractors Association and Asbestos Workers, Local No. 6 of Boston, art. X, ¶ 3. The first of these appears as a "Representative Local Union Contract Incorporated by Reference in [the PLA]", *Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.*, No. 90-1392 (1st Cir.), Joint Appendix, Vol. 4, at 92. The others are "incorporated [in the PLA] by reference as if fully set forth", and "may be examined at the address specified in the Advertisement for Bids where Documents may be obtained and are available upon request". *Id.* at 43.

[14] *See* NLRA §§ 8(a)(5), 8(b)(3), 9.

[15] NLRA § 7. Activities employees may eschew include "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection".

[16] *See* NLRA § 9.

[17] *See* NLRA § 8(a)(3).

ment on their own terms,[18] and to refuse to associate with unions.[19]

B. Petitioners pretend that

> [n]either the Project Agreement nor Specification 13.1 restricts the bidding to "union" contractors. Rather, the agreement specifies that any qualified bidder is free to compete for a contract, without regard to whether the bidder has any preexisting bargaining relationship with a union, and without regard to the bidder's willingness to sign any other agreement with a union.[20]

In fact, however, the PLA and BS 13.1 compel nonunion bidders to *become* "'union' contractors" as an inflexible, unavoidable condition precedent to and consequence of being awarded a contract or subcontract. *Sotto voce*, petitioners admit as much when they advance the "take-it-or-leave-it" argument that,

> [c]onfronted with such a purchaser [as the MWRA, which chooses to do business only with construction contractors willing to enter into a union-only project agreement], those contractors who do not normally enter such agreements, *can alter their normal operating methods to secure the business opportunity at hand, or seek business from purchasers whose perceived needs do not include a project labor agreement*.[21]

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[18] *See* Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 251 (1917).

[19] *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977). Although not employees, respondents may vicariously assert the constitutional rights of their employees in this case. *See, e.g.*, Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 956-59 (1984).

[20] BP at 8.

[21] *Id.* at 36 (emphasis supplied).

Moreover, that an otherwise qualified nonunion bidder may compete for contracts "without regard to * * * any *preexisting* bargaining relationship with a union" or "to the bidder's willingness to sign any *other* agreement with a union" is palpably irrelevant to the requirement that the bidder enter into a prescribed future bargaining relationship and agreement with a union specifically as to the Boston Harbor Project.[22]

Petitioners further disingenuously contend that

> "nonunion employees are not frozen out of the job market by . . . agreements" such as this one. * * * "Even where construction unions successfully negotiate collective-bargaining agreements that require . . . contractors and subcontractors to obtain their labor from union hiring halls, the union must refer both members and nonmembers to available jobs."[23]

The PLA and BS 13.1, however, precisely "fr[eeze] out of the job market" nonunion employees *qua* ***nonunion*** employees. For although they might possibly be hired on a nondiscriminatory basis through the union hiring halls,[24] under the PLA nonunion employees thereafter automatically and unavoidably are subjected to unwanted union representation and "membership"—the

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[22] Self-evidently, "one is not to have the exercise of his [constitutional rights] in appropriate places abridged on the plea that [they] may be exercised in some other place". Schneider v. Town of Irvington, 308 U.S. 147, 163 (1939).

[23] BP at 8, *quoting* Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 664-65 & n.18 (1982).

[24] The theoretically nondiscriminatory operation of union hiring halls often obscures their practical effect as a mechanism for imposing compulsory unionism through *de facto* "closed-shop" practices. *See, e.g.*, T.R. Haggard, *Compulsory Unionism, the NLRB, and the Courts: A Legal Analysis of Union Security Agreements*, Labor Relations and Public Policy Series No. 15 (U. Pa., Industrial Research Unit, 1977), at 97-113.

sum of which imposes on them the badges and incidents of unionism most practically onerous from the perspective of their acquiring and retaining employment.

Petitioners also attempt in three ways to camouflage how these arrangements oppress nonunion employees. *First*, they proffer as "an added safeguard" that "the union security provisions of the agreement may only require employees to undertake certain financial obligations of membership, and may not require membership itself".[25] A correct statement of the law[26] in a brief filed with this Court hardly mitigates the infringement of nonunion employees' rights on the Boston Harbor job site, however.[27]

For the PLA and its included Schedules themselves explicitly impose union-*membership* conditions far beyond what the NLRA or the Constitution allows. Self-evidently, the typical construction worker, unfamiliar with the legal labyrinth of "union-security" litigation, will read the Schedules to require what they say: namely, that he become a "member[ ] of the Union in good standing", that he "qualif[y] and compl[y] with the Constitution and By-Laws of the Union", that he "tender the full and uniform admission fees in effect in the Union", that he "subject [himself] to the laws and regulations of the Union", and that he remain a full union member throughout his employment on the Boston Harbor Project—in short, that he surrender his fundamental rights in ways even petitioners admit they cannot command. Certainly the United States so reads the

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[25] BP at 8-9 n.4.

[26] *See* Communications Workers v. Beck, 487 U.S. 735 (1988) (NLRA); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (public employment).

[27] And petitioners' statement is correct only in the most general sense, as it artfully leaves undefined what the "certain financial obligations" are.

Schedules.[28] In actuality, then, the *real* "added safeguard to employees" petitioners extol is that nonunion employees desirous of reconciling their jobs with their right to minimize forced association with unions may, if they are sufficiently practiced in the pilpulism of labor-relations law to comprehend their rights at all, bring time-consuming and expensive lawsuits to challenge the extent of the PLA's "union-security" provision![29]

Second, petitioners offer that

> employees working under a prehire contract may, notwithstanding the agreement, petition the NLRB at any time for an election to decertify their bargaining representative or deauthorize that representative from * * * enforcing any union security requirements.[30]

Again, the theoretical correctness of this observation merely highlights the practical-*cum*-constitutional burden the PLA and BS 13.1 impose on each nonunion employee. To obtain relief, the employee must either waive his nonunion status (thereby surrendering his right of nonassociation) or organize enough of his fellow-employees to trudge through the NLRB's protracted election-procedures to win back what is his as a matter of right (thereby being forced to exercise his right of association).[31]

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[28] *See* Brief for the United States as Amicus Curiae [at the Petition Stage] at 3 (emphasis supplied): The PLA requires nonunion contractors "to require hired workers *to join* the relevant union within seven days".

[29] The landmark *Beck* case, for example, consumed *twelve years* in litigation. *See* 487 U.S. at 739.

[30] BP at 9 n.4.

[31] Petitioners' suggestion is particularly cynical, as the traditional apology for NLRA §§ 8(e) and 8(f) is that organization of employees is peculiarly difficult in the construction industry. *See* BP at 9, *citing* S. Rep. No. 187, 86th Cong., 1st Sess. 55-56 (1959); NLRB v. Local 103, Iron Workers, 434 U.S. 335, 348-49 (1978).

And third, petitioners paint "the scope and effects of these arrangements" as "narrowly tailored to confine their impact to the Boston Harbor Project".[32] This case would not be here on a writ of certiorari, however, were it so parochial. In fact, the issue of the use by state agencies of project labor agreements fostering compulsory unionism has nationwide impact.[33] Furthermore, viewed from a nationwide perspective, resolving the issue as petitioners urge would have a massively disproportionate effect on nonunion employees, who constitute the great majority of construction workers in the country.[34]

C. This Court has held, again and again, that no governmental agency may condition the receipt of public benefits on an

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[32] BP at 26.

[33] In addition to the decision of the First Circuit here for review, *see* Phoenix Eng'g, Inc. v. MK-Ferguson Co., 1992 WL 125001 (6th Cir. 11 June 1992); Associated Builders & Contractors, Inc. v. City of Seward, 1992 WL 118875 (9th Cir. 5 June 1992); Glenwood Bridge, Inc. v. City of Minneapolis, 940 F.2d 367 (8th Cir. 1991).

[34] Petitioners tell the Court that "[u]nion members comprise a large portion of the construction labor force in the Boston area. Unionized contractors perform more than 75 percent of the commercial construction work in the area." BP at 5. If true for Boston, these figures do not represent the situation nationally. "[B]etween 1966 and 1986 the percentage of all workers in construction who were union members plummeted 19.4 percentage points, a 47 percent decline." By 1986, only 22% of the workers in all construction occupations were union members; and only 23.4% of the workers in those occupations were covered by collective-bargaining agreements. Indeed, "[u]nionized blue-collar construction workers have lost so much of the market to the nonunion sector over the past decade that if this trend continues another five to ten years, they will no longer be a significant factor in labor markets." Allen, *Declining Unionization in Construction: The Facts and the Reasons*, 41 Indus. & Lab. Rel. Rev. 343, 346, 345 (Table I), 349 (1988).

individual's surrender of constitutional rights,[35] whether those benefits are labelled "rights" or "privileges".[36] Perforce of the Supremacy Clause,[37] this doctrine applies, as well, to attempts by state and local agencies to compel waivers of federal statutory rights.[38] Here, BS 13.1 imposes precisely such an unconstitutional condition on receipt of the public benefit of a contract or subcontract on the Boston Harbor Project. And for this improper condition, petitioners can interpose no excuse.

First, petitioners cannot rely on a congressional license for project labor agreements under NLRA §§ 8(e) and 8(f), because that allowance extends only to *private* employers.[39] And, in any

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[35] *E.g.*, Branti v. Finkel, 445 U.S. 507, 513-16 (1980); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233-34 (1977); Perry v. Sinderman, 408 U.S. 593, 597 (1972); Graham v. Richardson, 403 U.S. 365, 374-75 (1971); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969); Pickering v. Board of Educ., 391 U.S. 563, 568 (1968); Whitehall v. Elkins, 389 U.S. 54, 59-62 (1967); United States v. Robel, 389 U.S. 258, 263-66 (1967); Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967); Elfbrandt v. Russell, 384 U.S. 11, 17-19 (1966); Baggett v. Bullitt, 377 U.S. 360, 379-80 (1964); Sherbert v. Verner, 374 U.S. 398, 404-06 (1963); Cramp v. Board of Public Instruction, 368 U.S. 278, 288 (1961); Torcaso v. Watkins, 367 U.S. 488, 495-96 (1961); Shelton v. Tucker, 364 U.S. 479, 485-86 (1960); Speiser v. Randall, 357 U.S. 513, 518-20 (1958); Slochower v. Board of Higher Educ., 350 U.S. 551, 555 (1956); Wieman v. Updegraff, 344 U.S. 183, 192 (1952); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 630-31 (1943).

[36] *E.g.*, Board of Regents v. Roth, 408 U.S. 564, 571 & n.9 (1972); Bell v. Burson, 402 U.S. 535, 539 (1971).

[37] U.S. Const. art. VI, cl. 2.

[38] *Cf.* Felder v. Casey, 487 U.S. 131 (1988) (State may not condition access to its courts for purpose of litigating federal claim under 42 U.S.C. § 1983 on litigant's compliance with State's "notice-of-claim" law).

[39] *Compare* NLRA §§ 8(e) ("nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry") *and* 8(f) (not "an unfair labor practice * * * for an employer engaged

event, petitioners emphasize that the MWRA "is not purporting to act as [an employer]; nor does the legal validity of its actions depend on [its] being an 'employer'".[40] On the other hand, petitioners cannot rely on the PLA's being "a collective bargaining agreement between Kaiser—undeniably an 'employer' for purposes of [NLRA §§ 8(e) and 8(f)]—and the BCTC", which is a "labor organization" under those sections.[41] For the mere assumed legality of the *agreement* does not compel the conclusion that *BS 13.1* is derivatively lawful, too.[42] After all, even

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primarily in the building and construction industry" to make such an agreement) *with* NLRA § 2(2) ("term 'employer' • • • shall not include • • • any State or political subdivision thereof").

[40] BP at 28. The PLA itself recites that "[n]one of the provisions [therein] shall apply to the [MWRA]". Art. II, § 7, *in* MWRA Pet. App. at 115a.

[41] *Pace* BP at 28.

[42] *Amicus* describes the legality of the PLA as merely "assumed", because no one has focussed on the possibility—or, *Amicus* suggests, the compelling argument—that the agreement be viewed, not as an *independent contractual* act of Kaiser in its capacity as a *private employer*, but rather as part and parcel of the MWRA's improper attempt, as a *governmental agency*, to *regulate* the Boston construction industry to the special advantage of the BCTC. Yet, as petitioners themselves recite the relevant history, the MWRA affirmatively

> sought Kaiser's recommendations for a labor relations plan • • • . Kaiser responded by recommending that the Project be governed by a master labor agreement • • • .
>
> In response to those recommendations, the [MWRA] authorized Kaiser to attempt to negotiate such a "project labor agreement" with the BCTC • • • . The [MWRA] reserved the right to approve the final agreement.
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> • • • •
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> • • • [T]he [MWRA's] Board of Directors approved the Project Agreement and determined that the project work should be carried out according to the Agreement's terms. To give effect to this decision, the [MWRA] incorporated Bid Specification 13.1 into its solicitation of bids

were the PLA arguably the result of the free collective bargaining between *private* parties that Congress enacted NLRA §§ 8(e) and 8(f) to foster, BS 13.1 remains undeniably a *governmental* mandate that *dispenses* with free (or even any) collective bargaining between nonunion contractors and subcontractors and the BCTC (or any other labor organization), and instead *dictates* the unique form labor relations must take on the Boston Harbor Project.

Second, petitioners may not avoid the absence of a license in NRLA §§ 8(e) and 8(f) for the MWRA's *governmental*, *nonemployer* action by glibly asserting that the

> MWRA's purchasing decision • • • is a choice by *a* purchaser of construction services to take advantage of an option that Congress intentionally made available to *such* purchasers[,]

and that the MWRA was

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for work on the Project.

BP at 6-7. The PLA itself states that

> [i]t is understood by the parties to this Agreement that it is the policy of the [MWRA] • • • that the construction work covered by this Agreement shall be contracted to Contractors who agree to execute and be bound by the terms of this Agreement.

MWRA Pet. App. at 109a. Certainly, this course of events and understanding by all parties strongly supports the conclusion that Kaiser's real role was, not to make purely economic decisions informed by free-market forces, but instead to implement through the PLA the MWRA's political policy later explicitly embodied in BS 13.1.

Inasmuch as important constitutional rights are involved here, this Court may (and, indeed, should) independently review the record and make its own assessment of these "constitutional facts". *See, e.g.*, Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984).

> acting in its proprietary capacity *as a property owner purchasing construction services in order to develop its property*. Its role is no different from that often—and lawfully—played by private owners of construction projects who choose to have the construction services they purchase performed under a project labor agreement in order to further their economic interests.[43]

For this apology simply begs the interrelated questions of whether:

- in enacting the special privileges of §§ 8(e)and 8(f) for "purchaser[s] of construction services" in the *private* sector, Congress foresaw and intended *both* that "purchasers" would be the parties demanding project labor agreements *and* that the class of such "purchasers" would include *public*—as well as private-sector buyers;[44] and

- in promulgating BS 13.1, the MWRA, perforce of its *governmental* character, played a "role" necessarily different in kind from any private owner of a construction project.

These questions demand analysis, not simply assumed answers, because the supposed legitimacy of BS 13.1 cannot derive from the mere self-serving description of the MWRA's having "act[ed] in its proprietary capacity *as a property owner purchasing construction services in order to develop its property*". True, "state action in the nature of 'market participation' is not

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[43] BP at 24 (emphasis supplied), 28 (emphasis in the original).

[44] Petitioners claim legislative history evidences congressional awareness that project labor agreements were routinely used on public projects. BP at 30-33. Deliberately unclear, however, is whether any agreement to which petitioners advert paralleled BS 13.1 and the PLA. After all, governmental agencies' awards of contracts to private contractors who, independently of any governmental command or pressure, work under project labor agreements for their own (the contractors') economic reasons are critically distinguishable from awards of contracts only to private bidders who acquiesce in such agreements.

subject to the restrictions placed on state regulatory power by the Commerce Clause"—but, "[w]hat the Commerce Clause would permit States to do in the absence of the NLRA is • • • an entirely different question from what States may do with the Act in place".[45]

Third, and most fundamentally, petitioners cannot rely *sub silentio* on some kind of assumed legitimacy for *the MWRA's* unilateral designation of the BCTC as the exclusive representative for nonunion employees employed on the Boston Harbor Project. Even in a paradigmatically *private* case under the NLRA, exclusive representation has never received this Court's constitutional imprimatur against a due-process, much less a freedom-of-association, challenge.[46] Yet, in the paradigmatical-

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[45] Wisconsin Dep't of Industry, Labor & Human Relations v. Gould, Inc., 475 U.S. 282, 289-90 (1986).

[46] When the constitutionality of the NLRA was first in issue, the NLRB selected its test-cases "intentionally [to] avoi[d] presenting the Court with the 'touchy' and more doubtful question[ ]" of exclusive representation. J.A. Gross, *The Making of the National Labor Relations Board: A Study in Economics, Politics and the Law, 1933-1937*, at 187 (1974). And in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937), this Court avoided the problem of *exclusive* representation by interpreting the statute to permit individual employees to bargain directly with their employer over the terms and conditions of their employment. *Accord*, Virginian Ry. v. System Fed'n No. 40, 300 U.S. 515, 548-49 (1937) (Railway Labor Act). Only seven years later, in cases raising issues of statutory construction alone, did this Court purport to re-interpret the labor acts to preclude individual contracts under some circumstances. J.I. Case Co. v. NLRB, 321 U.S. 332, 334-39 (1944); Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 346-47 (1944). Neither of these decisions, however, reconsidered the constitutional matters discussed in *Jones & Laughlin* and *Virginian* Railway, although the statutory constructions adopted in those cases predicated their constitutional holdings. *See* Comment, *The Mechanics of Collective Bargaining*, 53 Harv. L. Rev. 745, 739-91 (1940). The later decision in *Steele* v. *Louisville & N.R.R.*, 323 U.S. 192, 198 (1944), also pretermitted the question by creating the duty of fair representation, precisely to avoid grappling with the serious problems of due process and equal protection that exclusive representation raises. *See* Vaca v. Sipes, 386 U.S. 171,

ly private case, the employees themselves select (or reject) an exclusive representative by majority vote,[47] thereby exercising freedom of choice in a collective sense at least. Here, BS 13.1 and the PLA cavalierly dispense with majority votes—or even *any* participation by employees—to *impose* an exclusive repre-

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182 (1967); Weyland, *Majority Rule in Collective Bargaining*, 45 Colum. L. Rev. 556, 568-69 (1945).

The only decision of this Court that squarely addressed exclusive representation is *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936). Referring to its exclusive-representation provision as the basis for declaring unconstitutional the Bituminous Coal Conservation Act, the Court said:

> The effect, in respect of wages and hours, is to subject the dissentient minority • • • of • • • miners • • • to the will of the • • • majority • • • .
>
> • • • •
>
> The power conferred upon the majority is • • • the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. • • • [A] statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property.

298 U.S. at 311. Concurring, Chief Justice Hughes added that

> [t]he [exclusive-representation] provision permits a group of • • • employees, according to their own views of expediency, to make rules as to hours and wages for other • • • employees who were not parties to the agreement. Such a provision, apart from the mere question of the delegation of legislative power, is not in accord with the requirement of due process of law.

Id. at 318 (separate opinion). This judicial history hardly suggests that exclusive representation is constitutionally pristine.

[47] *See* NLRA § 9(a).

sentative that, by hypothesis, nonunion employees would never accept were they afforded the right to choose.[48]

II. The illegality of Bid Specification 13.1 cannot be ignored on the plea that the Massachusetts Water Resources Authority should have the same freedom available to it as private parties enjoy under National Labor Relations Act sections 8(e) and 8(f).

Ultimately, petitioners' argument reduces to their rejection of the thesis that

> Congress intended to deny to the states alone, when developing their own property, the construction industry arrangements referred to in §§ 8(e) and 8(f). * * *
>
> The inference the court of appeals drew from the statutory language of a congressional desire to *decrease* the options available to public owners and developers of property—while leaving a broader range of options available to private owners and developers—is unwarranted.[49]

The notion that in NLRA §§ 8(e) and 8(f) Congress intended to "deny" rights to the States, however, grossly misreads the jurisprudence of American labor relations in its historical context.

A. Before enactment of the NLRA, the law of labor relations in the private sector rested on the common-law and constitutional doctrine of freedom of contract, as to both

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[48] That the second proviso to NLRA § 8(f) allows employees to vote to decertify an exclusive representative or deauthorize a "union-security" arrangement dilutes this criticism only if petitioners are correct in characterizing BS 13.1 as the act of a "proprietor" rather than a regulator—which, of course, they are not.

[49] BP at 27.

individual and collective bargaining.[50] Under freedom of contract, private employers, employees, and unions could voluntarily structure labor relations in a variety of ways, from the union-only "closed shop" at the collectivistic end of the spectrum,[51] to the nonunion so-called "yellow-dog contract" at the individualistic end.[52] *A fortiori*, these parties could adopt the type of labor agreements that NLRA §§ 8(e) and 8(f) now countenance, as these agreements are simply watered-down versions of various "closed-shop" schemes.

The present NLRA severely restricts and modifies the common-law pattern of labor relations. Of primary interest here, the "closed shop" and the true "union shop" are impermissible.[53] And the "yellow-dog contract" is also unlawful.[54]

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[50] The best survey, through comparison and contrast, of the legal landscape before and after passage of the NLRA remains Petro, *Civil Liberty, Syndicalism, and the NLRA*, 5 U. Tol. L. Rev. 447 (1974).

[51] Under a "closed-shop", an employer may hire only employees who are already members of the union. T.R. Haggard, *ante* note 24, at 4.

[52] *See, e.g.*, Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 250-53 (opinion of the Court), 269-72 (Brandeis, J., dissenting) (1917).

[53] Section 8(3) of the original NLRA allowed the "closed shop"; but this was changed in the Taft-Hartley Amendments of 1947 that created NLRA § 8(a)(3). Under a true "union-shop" arrangement, a nonunion employee may be hired, but as a condition of continued employment within a fixed period must actually join the union, becoming a "member in good standing" and subjecting himself to the union's constitution and by-laws. T.R. Haggard, *ante* note 24, at 4; *Black's Law Dictionary* 322 (4th ed. 1968). NLRA § 8(a)(3), however, allows only an "agency-shop" scheme, under which the maximum condition on the continued employment of nonunion employees is that they pay the union "dues and fees" equal to their proportionate share of the union's costs of collective bargaining on their behalf. Communications Workers v. Beck, 487 U.S. 735, 754-55 (1988).

[54] *See* NLRA § 8(a)(1, 3, 5). *See also* Norris-LaGuardia Act § 3, 29 U.S.C. § 103.

Instead, in the general case the NLRA establishes a regime of "voluntarily unionism" among employees,[55] into which it precludes employers from intervening. In the construction industry, nonetheless, NLRA §§ 8(e) and 8(f) retain a truncated part of the traditional common-law freedom for employers and unions to agree to "closed-shop"-type arrangements.[56]

In short, NLRA §§ 8(a) and 8(f) do not *grant* rights, powers, or privileges to private-sector employers or labor organizations. Rather, they immunize those parties from "unfair-labor-practice" prohibitions other sections of the act impose, prohibitions that themselves purport to deny or limit common-law and constitutional rights, powers, and privileges sounding in freedom of contract and today (with the expansion of First-Amendment jurisprudence since the 1930s) freedom of association. Whether these denials or limitations are themselves constitutionally valid this Court need not consider here. Suffice it to recognize that the exceptions embodied in NLRA §§ 8(e) and 8(f) merely revive a part of the jurisprudential *status quo ante* the 1930s for private-sector employers, employees, and unions.

B. In enacting these exceptions, however, Congress "deprived" the States of nothing. Neither did the Court of Appeals "deprive" the MWRA of anything by holding preempted the MWRA's intervention, under color of BS 13.1, into the process of collective bargaining through freedom of contract that the NLRA mandates.[57] For the States *never* enjoyed, nor now enjoy, any right, power, or privilege to condition grants of

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[55] *See* Pattern Makers' League v. NLRB, 473 U.S. 95, 106 (1985).

[56] Even in this license, though, the NLRA limits any "union-security" arrangement to an "agency shop", and allows the employees to decertify the union as their exclusive representative or to deny it authorization to impose an "agency-shop" requirement on them. NLRA § 8(f), first and second provisos.

[57] *E.g.*, H. K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970).

public-works contracts to private employers on the latters' acquiescence in or enforcement of the type of union-only arrangements the PLA prescribes.

1. Were this a case of construction performed by *the MWRA* as a *governmental* agency, the MWRA could arguably condition employment of *its own* employees on their acceptance of a process of "majority vote" to choose (or reject) union representation, in loose analogy to the scheme under NLRA § 9(a).[58] BS 13.1 and the PLA, however, directly impose such representation on the employees of *private third parties*, without even the fig-leaf of a preliminary vote among those employees—thereby clearly abridging the employees' freedom of (non)-association, absent a showing (never made here) by the MWRA that this imposition serves a compelling state interest through the means least-restrictive of the employees' First-Amendment freedoms.

2. Were this a case in which the MWRA conditioned grants of public contracts on private employers' agreement to recognize the rights of their employees to select (or reject) union representation by "majority vote", the condition would not be inconsistent with the basic "voluntaristic" thrust of the NLRA as expressed in §§ 8(a) and 9(a). But it would unquestionably be preempted.[59]

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[58] *Amicus* emphasizes the qualification "arguably", because the analogy of public-sector to private-sector labor relations is loose at best, and ultimately unpersuasive on the merits. *See, e.g.*, Petro, *Sovereignty and Compulsory Public-Sector Bargaining*, 10 Wake Forest L. Rev. 25 (1974); E. Vieira, Jr., *To Break and Control the Violence of Faction: The Challenge to Representative Government from Compulsory Public-Sector Collective Bargaining* (Foundation for Advancement of the Public Trust, 1980); Vieira, *Of Syndicalism, Slavery and the Thirteenth Amendment: The Unconstitutionality of "Exclusive Representation" in Public-Sector Employment*, 12 Wake Forest L. Rev. 515 (1976).

[59] *See, e.g.*, Wisconsin Dep't of Industry, Labor & Human Relations v. Gould, Inc., 475 U.S. 282 (1986).

3. Here, BS 13.1 and the PLA combine the worst aspects of the preceding two cases, in that the MWRA, a governmental agency, has directly imposed on third-party private employers and employees compulsory unionism, *in contravention of* the NLRA's policies that: (i) free collective bargaining between employers and unions, not governmental dictation, should determine the substance of labor-management agreements, even under NLRA §§ 8(e) and 8(f);[60] and (ii) from the very beginning, unionism should reflect the voluntary choices of the employees themselves, except where employers and unions freely negotiate a § 8(f) agreement. Described in these stark terms—as reality demands—BS 13.1 *must* be disallowed under the preemption doctrine, if the basic purposes of the NLRA are to be advanced.

4. Moreover, as the explicit terms of the "union-security" agreements in the Schedules to the PLA evidence,[61] BS 13.1 clearly violates the first proviso of NLRA § 8(f), and is therefore affirmatively illegal under the act, not (as petitioners claim) an innocent attempt by the MWRA to enjoy lawful options available to private parties.

In sum, invalidation of BS 13.1 deprives the MWRA of no rights, powers, or privileges—but instead thwarts its usurpation of powers lacking a source in traditional common law, illegal under and at best subversive of the NLRA, and surely beyond constitutional limitations in any event.

C. Finally, unable to find substantial solace in the law, in a *tour de force* of self-contradictory reasoning petitioners invoke the "*free* market" to rationalize their imposition of *compulsory* unionism. BS 13.1 and the PLA, they say, exemplify "the 'free

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[60] *See* Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608 (1986).

[61] *Ante* pp. 6-7.

play of economic forces' that Congress intended to govern construction industry labor relations".[62]

If the MWRA accepted bids from contractors irrespective of whether they operated on a nonunion or union basis—thus, leaving to them the choice to negotiate an NLRA § 8(f) agreement *vel non*—it could fairly be described as participating in a "free market", notwithstanding its character as a governmental agency. Conversely, where (as here) the MWRA effectively outlaws bids by contractors who refuse to eschew nonunion operations, it thwarts the operation of the "free market", by hypothesis.[63]

At base, the real reason for BS 13.1 relates to "free markets" only in that union contractors can no longer compete against nonunion contractors in the economic realm without *political* assistance. The tremendous losses unionized contractors have suffered in market share over the past decades, labor-economists explain,

> have an important implication for the future of unionism in construction. Wage givebacks are not likely to help restore much of the market share lost in recent years to the open shop. The productivity advantage of union contractors has eroded to such a degree that the size of wage cuts needed to restore a balance between the wage and productivity

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[62] BP at 24.

[63] The government acts consistently with the "free market" where it protects private property and enforces the bargains at which private parties arrive through exercises of their freedom of contract. Governmental intervention that circumscribes the rights of private property, or narrows the field for free contracts, on the other hand, is antithetical to the "free market". The Constitution may permit such intervention in the public interest, provided it has a rational basis, and satisfies the compelling-state-interest and least-restrictive-alternative tests where fundamental freedoms are concerned. But it offends fair discourse to claim (as petitioners do) that, because it is legally permissible to *override* "free-market" choices, such intervention is *part of* the "free market".

> gaps is unlikely to be acceptable to the rank-and-file. Instead, the focus of both union leaders and unionized contractors must be on rebuilding the union productivity advantage.[64]

Absent such problematic and long-term "rebuilding", construction unions and union contractors have only one immediate alternative to gradual extinction by the market forces upon which petitioners feign reliance: *political* monopolization of the construction market, which in the arena of public-sector construction takes the form of alliances with governmental authorities to seize through regulation (deceptively mislabelled as "purchasing decisions", as in this case) what the unions and unionized contractors cannot win through fair competition in the "free market" they pretend to praise and espouse. Thus, properly scrutinized, BS 13.1 stands out as a naked example of "rent-seeking" by special-interest groups in collusion with public officials (that is, the use of governmental intervention to obtain returns for those groups above and beyond what they could earn in the "free market"), not "the 'free play of economic forces' that Congress intended" in the NLRA and that petitioners disingenuously appropriate to disguise what they are really about.

C. The "rent-seeking" in this case is particularly odious because of its extortionate nature. Bluntly put, the PLA exemplifies the "protection racket" in operation in the construction industry, with a governmental agency serving as the procurer and enforcer. As petitioners themselves explain, the Boston Harbor Project is subject to "numerous detailed [court] orders * * * making no allowance for delays from * * * labor disputes". During the ten-year life of the project, many collective-bargaining agreements of unionized contractors "will be up for renegotiation numerous times"; "[e]ach renegotiation creates a potential for a strike or other form of lawful concerted action"; and "a strike and picketing by one union potentially

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[64] Allen, *ante* note 34, at 359.

could halt the work of a number of contractors". Thus, the purpose of the PLA was to "promote labor harmony" uniquely with the BCTC, by requiring all contractors to recognize "the BCTC as the exclusive bargaining agent of all craft employees on the Project"—lest the BCTC unleash "labor unrest" upon the citizens of Boston.[65]

> On practical grounds, the Court of Appeals was rightly
>
> skeptical of the *pax industrial* which the [PLA] utopically promotes. This peaceable kingdom may be somewhat less than attainable considering that this contract is no bar to rival, or for that matter, anti-union, activity. *See* 29 U.S.C. § 158(f); *last proviso*.[66]

On constitutional grounds, this Court should be more than just skeptical, because the sweetheart deal among the MWRA, Kaiser, and the BCTC rewards the BCTC and unionized contractors with valuable public benefits at the expense of nonunion contractors and nonunion employees, who lose their constitutional rights to operate on a nonunion basis.[67]

Were the PLA an ordinance mandating special privileges for unions in the letting of public contracts, its antagonism to the public interest would be patent. For such blatant *pro*-union favoritism flies in the face of "'the primary duty of * * * public

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[65] BP at 3-4, 5-6 (footnote omitted), 7.

[66] 935 F.2d at 354. Petitioners themselves fuel such skepticism, when they tout as a "safeguard" the right of nonunion employees the PLA shanghais into the BCTC to "petition the NLRB at any time for an election to decertify their bargaining representative or deauthorize that representative from negotiating or enforcing any union security requirements". BP at 8-9 n.4.

[67] That the BCTC waives the right to strike during the life of the PLA does not sanctify the scheme. Petitioners would need to show that a "project agreement" *not* imposing compulsory unionism, but requiring a no-strike pledge from the employees of each successful bidder, was impractical.

officers * * * to secure the most advantageous contract[s] possible for accomplishing the work under their direction'";[68] squanders public funds by preventing competition;[69] and exceeds the proper discretion of public officials.[70] This should be

> too clear for argument. Government is instituted for the benefit of all the people and not for the benefit of any one class to the exclusion of others. * * * [B]ut just in proportion as competition is restricted, and the award [of a public contract] is hedged about with express or implied conditions by which a favored person or a favored class is insured a preference over others of equal ability and capacity, public rights are imperiled and public interests are sacrificed. Such discrimination tends to monopoly, and involves a denial of the equality of right and of opportunity which lies at the foundation of republican institutions. * * *
>
> * * * The citizen may be * * * union or non-union upon the labor question; * * * Republican, Democrat, or Prohibitionist in political affiliation; but * * * he is neither more nor less than a citizen of the state, entitled to an equal opportunity therein according to the capacity and ability with which nature may have endowed him. In denying him that opportunity a double wrong is perpetrated, first, upon the individual who is entitled to be considered upon his personal merits uninfluenced by these extrinsic considera-

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[68] Upchurch v. Adelsberger, 332 S.W.2d 242, 243 (Ark. 1960).

[69] Miller v. City of Des Moines, 143 Iowa 409, 420, 122 N.W. 226, 230 (1909). *Accord*, Master Printers Ass'n v. Board of Trustees, 356 F. Supp. 1355, 1357-58 (N.D. Ill. 1973); Wright v. Hoctor, 95 Neb. 342, 348, 145 N.W. 704, 706 (1914); Lewis v. Board of Educ., 139 Mich. 306, 310, 102 N.W. 756, 757 (1905); City of Atlanta v. Stein, 36 S.E. 932, 933-34 (Ga. 1900); Adams v. Brenan, 177 Ill. 194, 201, 52 N.E. 314, 316-17 (1898).

[70] City of Atlanta v. Stein, 36 S.E. 932, 933-34 (Ga. 1900). *See* State *ex rel.* United Dist. Heating, Inc. v. State Office Building Comm'n, 124 Ohio St. 413, 416, 179 N.E. 138, 139 (1931).

> tions; and secondly, upon the state at large, whose expenses are multiplied, and whose integrity [is] jeopardized by a system of favoritism, the demoralizing effect of which is patent to every thoughtful student of public affairs. * * * The mischief is * * * in its tendency and in the far-reaching consequences of legitimizing a system or practice so pregnant with evil possibilities.[71]

That the MWRA, Kaiser, and the BCTC have tried to camouflage their scheme by treating the PLA as a "private" arrangement to secure "labor peace", which BS 13.1 merely adopts, mitigates the mischief not at all. For the undeniable reality is that BS 13.1 constitutes a directive of public policy—and *the very nature of government requires above all else that threats by private groups be absolutely excluded from the catalogue of reasons that public officials may advance in support of actions that peculiarly benefit those groups at the expense of other segments of society.* In the private sector, both employers and unions may use economic coercion as a weapon to obtain so-called "bargaining power" against each other.[72] But this cannot translate into a license for the BCTC, by threatening to shut down the Boston Harbor Project with strikes and picketing, to misuse a *governmental* agency to drive from remunerative employment all other persons who will not accept its brand of compulsory unionism.[73] Besides the inapplicability of the

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[71] Miller v. City of Des Moines, 143 Iowa 409, 421, 122 N.W. 226, 230-31 (1909). *Accord, e.g.*, Printing Pressmen v. Meier, 115 N.W.2d 18, 20-21 (N.D. 1962) (invalidating statute that required particular union label on public work, on grounds that logic of statute, if sustained, would allow similar monopolies for political parties).

[72] *E.g.*, American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 317-18 (1965); NLRB v. Insurance Agents Int'l Union, 361 U.S. 477, 488-89 (1960).

[73] *Cf.* Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 531 (1949).

"bargaining-power" theory to the government,[74] ultimately the "rights of the employees to work for whom they will" and "the right of the employer * * * to free access of such employees" are "primary" as against even a lawful strike.[75] And the duty of government at all levels is to protect these rights, not sell them out.

CONCLUSION

The Court of Appeals correctly held BS 13.1 unconstitutional on pre-emption grounds. *Amicus* has shown that BS 13.1's unconstitutionality runs even deeper than that. For both these reasons, the judgment of the Court of Appeals should be affirmed.

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[74] *See* United States v. United Mine Workers, 330 U.S. 258, 274 (1947).

[75] American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 206 (1921).

Nos. 91-261 and 91-274

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IN THE

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OCTOBER TERM, 1992

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT,
Petitioner,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et al.*,
Respondents.

MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, INC.,
Petitioners,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the National Labor Relations Act preempts a state agency that is not in the construction industry from entering into and enforcing an agreement with a union that does not represent (or seek to represent) the agency's employees to require private construction employers to recognize that union and abide by the terms of a labor agreement between the union and another employer, under penalty of debarment from a $6.1 billion market.

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OCTOBER TERM, 1992

Nos. 91-261 and 91-274

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT,

Petitioner

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et al.*,

Respondents.

MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, INC.,

Petitioners,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE

The Associated General Contractors of America, Inc. ("AGC") is a private, nonprofit trade association founded in 1918 to represent the national interests of general construction contractors. AGC members perform work on both private and public construction projects.

AGC has 100 state and local chapters, with at least one chapter for each State and one chapter in Puerto Rico. Many of AGC's chapters have been and remain the vehicle for collective bargaining with unions that represent construction craft workers. At the same time, AGC and its chapters have represented and continue to represent the interests of construction contractors that are not signatories to collective bargaining agreements.

Because of the breadth and diversity of its membership, AGC is in a unique position to inform the Court about the important construction industry labor law and preemption issues raised by this case. Indeed, AGC has participated in other cases before this Court raising similar questions concerning the construction industry provisions of the National Labor Relations Act. *See, e.g., Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 (1982); *Connell Constr. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975). The parties have consented to the filing of this brief.[1]

STATEMENT OF THE CASE

1. The Massachusetts Water Resources Authority ("MWRA") is a governmental agency created by the Massachusetts legislature.

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[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of the Court.

Pet. App. 3a.[2] MWRA is authorized to provide water supply services, sewage collection, and treatment and disposal services for the eastern half of Massachusetts, and is charged with effecting a ten-year, $6.1 billion series of projects for a court-ordered clean-up of the Boston Harbor. *Id.* To this end, the MWRA furnishes funds for construction (assisted by state and federal grants), owns the property upon which building will occur, establishes bid conditions, and makes all contract awards to contractors performing construction on the project. *Id.* at 3a, 74a.

In April 1988, the MWRA retained Kaiser Engineers, Inc. ("Kaiser") as its program/construction manager for the Boston Harbor clean-up project. Pet. App. 3a-4a, 74a. Kaiser's primary function as program manager is to manage and supervise the construction activity on the project. *Id.* at 4a, 74a. Kaiser is also responsible for advising the MWRA about the development of labor relations policy on the project. *Id.*

2. When work in Boston Harbor began, the MWRA allowed both collective bargaining and open shop contractors to perform the work. J.A. 72-74. In November 1988, however, two member unions of the Building and Construction Trades Council ("Trades Council"), a coalition of 34 different unions in the local building and construction trades, picketed the project in order to protest the use of non-union labor by a contractor and, as a result, precipitated a brief work stoppage. Pet. App. 4a; J.A. 73. In response, Kaiser and the MWRA set up a reserve gate system, and thereby established separate entrances to the job site for employees of other contractors. Pet. App. 4a. Shortly thereafter, the work stoppage ended. *Id.*

The MWRA thereafter determined that Kaiser should negotiate a master labor agreement with the Trades Council. Pet. App. 5a,

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[2] Unless otherwise specified, "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 91-274.

75a. Kaiser and the Union understood that no agreement could be implemented without the MWRA's express approval. *Id.* On May 22, 1989, the Trades Council and Kaiser, "on behalf of" the MWRA, entered into such an agreement -- the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement (the "Master Labor Agreement"). *Id.* at 107a.

The Master Labor Agreement recognizes the Trades Council "as the sole and exclusive bargaining representative of all craft employees" on the project, and makes its hiring halls the initial and principal source for the project's labor force. Pet. App. 6a. It subjects all construction employees on the project to union security provisions, and requires that they become union members within seven days of their employment. *Id.* The Agreement also provides that employees must seek redress for their grievances only through the recognized labor organization, and that all contractors will be bound to the Council's wage, benefit, seniority, apprenticeship, job classification and other rules. *Id.* It further requires that all contractors make contributions to "union benefit trust funds." *Id.* Finally, the Agreement acknowledges that it is "the policy of the [MWRA] that the construction work covered by this Agreement shall be contracted to Contractors who agree to execute and be bound by the terms of this Agreement." *Id.* at 5a, 109a. The Master Labor Agreement expressly excludes employees of the MWRA from its coverage, and denies that Kaiser and the MWRA are "joint employers." *Id.* at 114a, 116a.

On May 28, 1989, the MWRA approved the Agreement. Pet. App. 5a, 75a. On that same day, the MWRA ordered that Bid Specification 13.1 be added to the specifications applicable to all construction work in Boston Harbor. *Id.* Bid Specification 13.1 provides that each contractor, as a condition of being awarded a contract, will abide by the provisions of the Master Labor Agreement. *Id.* at 5a, 72a, 141a. Thus, although MWRA must award all contracts and subcontracts to the lowest responsible and "qualified" bidder, to be so "qualified," a contractor must agree to follow the provisions of the Master Labor Agreement. *Id.* at 141a.

3. Following the issuance of Bid Specification 13.1, respondents filed this suit alleging, among other things, that the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 151 *et seq.*, preempts the actions taken by MWRA in entering into an agreement with the Trades Council to impose the Master Labor Agreement on private construction employers through Bid Specification 13.1. Pet. App. 72a; J.A. 15, 22-23. The district court, however, found that respondents were unlikely to succeed on the merits and denied a requested injunction. Pet. App. 76a-77a.

4. On appeal, the First Circuit sitting *en banc* reversed and remanded for further proceedings. The court found that "the state's intrusion into the bargaining process" was "pervasive" and that, by "mandat[ing] that a labor agreement be reached before a bid is awarded, . . . dictat[ing] with whom that agreement is going to be entered, and specif[ying] what its contents shall be," the MWRA has in fact "*eliminate[d]* the bargaining process altogether." Pet. App. 17a (emphasis in original). As between Kaiser and the Trades Council, the court accepted that the Master Labor Agreement was a valid labor contract under Sections 8(e) and (f) of the Act, but found that the validity of that agreement did not itself justify Bid Specification 13.1's interference with the organizational and collective bargaining processes that are the subject of the Act. Pet. App. 24a-25a.

5. In dissent, Chief Judge Breyer started from the premise that, were a private party letting these construction contracts, the NLRA would have permitted it to take the actions that MWRA had taken here. Pet. App. 32a. Chief Judge Breyer did not believe that, in such circumstances, an intent to preempt could reasonably be inferred from the Act. *Id.* at 41a, 45a.

SUMMARY OF ARGUMENT

I. The NLRA largely displaces all state regulation of industrial relations. Pursuant to *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), states are preempted from

regulating activity that the NLRA protects, prohibits, or arguably protects or prohibits. Pursuant to *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), states are preempted from regulating activity that Congress intended to be unregulated by any governmental authority. Both forms of preemption are implicated by this case.

By agreeing with the Trades Council to make employment on the Boston Harbor project the price of an employee vote to decertify the Trades Council, the MWRA has encumbered employee rights under Section 8(f) to reject a construction industry labor union and to cancel union security provisions. By agreeing to condition bidder eligibility on recognition of the Trades Council, the MWRA has encumbered the right of private contractors to compete without coercion from persons outside the construction industry. And, by imposing the agreement between Kaiser and the Trades Council on all contractors working in Boston Harbor, the MWRA has eliminated the free and uninhibited organizational and collective bargaining processes that Congress meant to leave unregulated. The former state actions are preempted by *Garmon*; the latter state action is preempted by *Machinists*.

The MWRA's actions are not saved from preemption by recognized exceptions for state minimum employment standards, *see Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), or for state actions pursuing wholly "local interests," *see Wisconsin Dep't. of Industry v. Gould, Inc.*, 475 U.S. 282 (1986). As the Solicitor General ironically concedes, those exceptions do not apply to state actions which, like the MWRA's actions, directly conflict with the NLRA's provisions or apply only to organizational and collective bargaining processes reserved by the Act to the parties. Nor is it relevant that the MWRA has acted in an allegedly proprietary capacity through its bidding regulations rather than pursuant to its police powers. States may not take actions, in any form, that conflict with the NLRA or interfere with its policies.

II. Petitioners' argument that the MWRA's actions are saved from preemption because Sections 8(e) and (f) of the Act permit private property owners or developers to agree with construction industry unions to impose project labor agreements on construction industry employers is unfounded. The construction industry proviso to Section 8(e) and Section 8(f) apply only to employers "in the construction industry" and to those employers "engaged primarily in the building and construction industry." A private owner/developer that hires a general contractor to manage, coordinate and oversee a construction project, and that does not itself control the method and manner of construction, is not such a construction industry employer.

In all events, this Court's decision in *Connell Constr. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), makes it clear that a mere third-party purchaser of construction does not fall within the Section 8(e) proviso. A private third-party purchaser of construction in the same position as the MWRA has, like the employer in *Connell*, no present or expected collective bargaining relationship with the union. *Connell* holds that union signatory requirements may not be enforced in such circumstances since Congress did not intend, in Sections 8(e) and (f), to allow unions to engage in such "top-down" organizing through a "stranger" employer, or to allow unions to extend their limited statutory monopoly power into the business end-product markets.

Petitioners have provided no persuasive reasons for extending the protection of the Section 8(e) proviso or Section 8(f) to third-party purchasers of construction. The MWRA is not in a "joint employer" relationship with Kaiser, and therefore cannot properly have Kaiser's shelter under the construction industry provisions imputed to it. Moreover, the inherent economic power of such a third-party purchaser, especially on market project of this size and type, is precisely the concern that led the Court in *Connell* to hold that hot cargo agreements with "stranger" employers are outside the protections of the proviso. Furthermore, there appears to be no evidence to establish that the

pattern of collective bargaining in the construction industry in 1959, which Congress intended to preserve in enacting the proviso, included restrictive secondary contracting agreements between construction industry unions and third-party purchasers. To the contrary, there is every reason to believe that such arrangements are novel organizing tactics that were first developed by unions in the early 1970s, and then extended to third-party purchasers only in the mid-1980s.

ARGUMENT

No one disputes that the NLRA permits a state agency to negotiate and enter into a collective bargaining agreement with a union that represents the agency's own employees. But the agreement of the MWRA and the Trades Council that is at issue here does not concern the wages, hours or other terms and conditions of employment of the MWRA's public employees. As the court below expressly noted (Pet. App. 19a-21a, 24a-25a), the MWRA is not here defending its role as a public employer entering into such an agreement. MWRA's employees are not represented by the Trades Council, and MWRA does not have a collective bargaining relationship with any of the construction industry unions in this case.

Nor is there any dispute that the NLRA permits private construction industry employers to negotiate project labor agreements that include broad subcontracting clauses and thereby establish the wages, hours and other terms and conditions of construction craft employment on public as well as private construction projects. On the contrary, the court below accepted (Pet. App. 24a) that Kaiser was free to negotiate such an agreement on this public construction project.

The court below only held (Pet. App. 17a-21a, 24a-25a) that the NLRA preempts the construction contract specification that the MWRA and the Trades Council agreed to use here (1) to mandate that private construction industry employers establish a bargaining relationship with a designated union, and (2) to dictate the terms

of that relationship, under penalty of debarment from a $6.1 billion market. Contrary to the claim of petitioners and their *amici*, this holding is neither startling nor perverse. It prevents "top-down" organizing in the construction industry "to an extent not contemplated by Congress." *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 268 (1983), citing *NLRB v. Iron Workers*, 434 U.S. 335, 338 (1978) (*Higdon*). In addition, it ensures that the limited monopoly power that the Act confers on construction industry labor unions cannot be extended into the end-product market (so as to raise consumer prices). *See Connell Constr. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 621-35 (1975).

In short, it is the argument of petitioners and their *amici*, and not the decision below, that would, if accepted, turn the NLRA on its head. Sections 8(e) and (f) of the NLRA do not permit either a public or a private property owner/developer that is merely purchasing construction from independent contractors to enter into a "hot cargo" or "pre-hire" agreement with a construction industry union.

I. THE NLRA PREEMPTS THE STATE'S EFFORT TO IMPOSE A COLLECTIVE BARGAINING RELATIONSHIP ON PRIVATE CONSTRUCTION INDUSTRY EMPLOYERS AND, FURTHER, TO DICTATE THE TERMS OF THAT RELATIONSHIP.

As this Court has long recognized, the NLRA "largely displaced state regulation of industrial relations." *Wisconsin Dep't. of Industry v. Gould, Inc.*, 475 U.S. 282, 286 (1986). While the Act does not define the precise scope of this displacement, the Court has developed two separate doctrines -- *Garmon* preemption and *Machinists* preemption -- that greatly clarify the extent of implied preemption in the field of labor-management relations. *See Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 110 (1989) (*Golden State II*); *Golden*

State Transit Corp. v. Los Angeles, 475 U.S. 608, 613 (1986) (*Golden State I*).

The Court's decision in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), reveals that the NLRA preempts state regulation of "activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Wisconsin Dep't of Industry v. Gould, Inc.*, 475 U.S. at 286. The purpose of *Garmon* preemption is to ensure that the Act will be interpreted and enforced by the congressionally designated federal agency, and not by the states. *Garmon*, 359 U.S. at 241-245; *see also Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 748 n.26 (1985). *Garmon* preemption prevents "conflict in its broadest sense" with the federal scheme. *Wisconsin Dep't of Industry v. Gould, Inc.*, 475 U.S. at 286.

Concomitantly, the Court's decision in *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), reveals that the NLRA also preempts state regulation of activity "that Congress intended to be 'unrestricted by *any* governmental power . . . .'" *Id.* at 141 (citation omitted) (emphasis in original). While the NLRA established an equitable process for determining the terms and conditions of employment, the Act generally leaves the outcome of that process to "'the free play of economic forces.'" *Id.* at 140, quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971). Thus, *Machinists* holds that state attempts to interfere in conduct that Congress meant to be unregulated "are as inconsistent with the federal regulatory scheme as are such attempts by the [National Labor Relations Board]." *Machinists*, 427 U.S. at 153; *id.* at 149-50; *Golden State II*, 493 U.S. at 110.

As the court below recognized (Pet. App. 15a-21a), both forms of preemption are implicated by this case. The NLRA protects the right of employees to decide whether to have a collective bargaining representative and, if so, who that representative will be. 29 U.S.C. §§ 157, 158(a), (b), 159 (1988). To be sure, the Act permits employers "engaged primarily in the building and construction industry" to negotiate and enter into agreements with

construction industry labor unions before their employees have had an opportunity to express their preferences. 29 U.S.C. § 158(f) (1988). The Act, however, also permits construction industry employees to petition the National Labor Relations Board ("NLRB") to reject or change the union representative that a "pre-hire" agreement imposes on such employees, and to cancel the union security provisions of the agreement. *Id.* In addition, the Act prohibits any employer that is not in the construction industry or that lacks a collective bargaining relationship with a construction industry union from expressly or impliedly agreeing with a union that it will cease doing business with any other person; indeed, the Act prohibits a union from threatening or coercing such an employer to enter into such an agreement. 29 U.S.C. § 158(b)(4), (e) (1988). Finally, the Act protects the right of employers to choose in good faith not to enter into collective bargaining agreements that are unacceptable to them. 29 U.S.C. § 158(d) (1988).

In mandating that all private construction employers seeking to bid on one or more of the projects in Boston Harbor agree to recognize the Trades Council as the representative of their employees, the MWRA has encumbered all of these rights. Specifically, the MWRA has encumbered the employees' Section 8(f) right to reject the Trades Council as their bargaining representative. It has made their employment on the project the price of choosing to decertify the Trades Council. Moreover, by agreeing with the Trades Council to condition contractor eligibility upon recognition of the Trades Council, the MWRA has encumbered the contractors' Section 8(e) right to be free of secondary pressures exerted by third parties outside the construction industry. And, finally, when it then dictated each and every term of the collective bargaining relationship that it had imposed on these private construction employers, the MWRA interfered with -- indeed, eliminated -- the collective bargaining processes that Congress envisioned. Under *Garmon*, the former state actions are preempted; under *Machinists*, the latter state action is preempted.

It is true, as petitioners note (Pet. Br. 23-24), that Congress did not intend the NLRA to create a regime in which employment policies in the private sector would be wholly insulated from all state actions. Thus, where states have imposed general employment standards which do not conflict with the NLRA's provisions, and which are equally applicable in union and non-union settings, the Court has held that the states' actions are not preempted. *See, e.g., Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. at 753-58; *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 22 (1987). But where, as here, the states have imposed standards which arguably conflict with the NLRA's provisions or which apply only to the organizational or collective bargaining processes fostered by the Act, the Court has consistently found that those state actions are preempted. *See, e.g., Wisconsin Dep't of Industry v. Gould, Inc.*, 475 U.S. at 288-89; *Golden State I*, 475 U.S. at 619. Indeed, preemption is essential here to prevent the MWRA from facilitating the Trades Council's patent effort (1) to exceed the congressionally imposed limits on a union's power to organize the employees of private construction employers from the "top down," and (2) to extend the union's monopoly power into the end-product market, and thereby raise prices for consumers. *See Connell*, 421 U.S. at 621-35.[3]

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[3] Professor Thomas J. Campbell has lucidly explained the economic dangers of permitting such an arrangement between a union and a third-party purchaser such as MWRA:

> The first is that, in dealing with product market effect, a potential for a product market cartel effect is created. This could give labor more of a return than even the maximum value of what labor contributes to output. It would also implicate the competing regulatory regime of antitrust. Second, even if labor does not derive any more total return from such conduct than it could from manipulating elasticities of substitution or other input supply, there is an incidence issue. The redistributive intention of the Labor Act was not an unrestricted license to capture consumer surplus (the benefit consumers enjoy from having to pay less than they are willing to pay for a certain amount of goods), but was directed at producer surplus (the profit derived

The Act does not preempt the states from pursuing wholly "local interests" through means that are "peripheral" to the Act. Thus, as petitioners and the Solicitor General repeatedly argue (Pet. Br. 4-6, 16, 25-26; U.S. Br. 29), the MWRA may legitimately attempt to ensure that potential labor disputes and disruptions do not impede its ability to meet deadlines imposed by a federal court for cleaning up the Boston Harbor. Time is a critical component of much construction, and many private as well as public owners insist upon timely performance by their contractors. As do many private property owners/developers, the MWRA may establish deadlines for substantial or final completion of each contract. It may require bonds or other commitments to ensure that work will be completed in a timely manner. It may pay incentives to contractors for completing their performance ahead of schedule, and it may assess liquidated damages for

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from sales revenue in excess of costs, including a normal profit).

> Admittedly, both kinds of surplus are diminished when a union succeeds in increasing the wage bill, but restraints derived from lowering the elasticity of demand in the product market directly favor the producer over the consumer. By contrast, manipulation of the elasticity of substitution and the elasticity of supply of other factors increases the pressure the union can bring to bear on the employer, which the employer can then pass along to consumers only according to the preexisting elasticity of product demand. Thus, over the years, the Board and courts have restricted the exercise of labor power precisely where economics indicated the victim was most likely a consumer not represented at the bargaining table, rather than management sitting across from the union agreeing to the terms. Consistent with this trend, the rule I suggest is that, in areas of ambiguity, the law ought to be construed to deny labor the power to manipulate the elasticity of final product demand. The statute and its interpretation by the Board and the courts have, in large part, tended in this direction.

T. Campbell, *Labor Law and Economics*, 38 Stan. L. Rev. 991, 1035-36 (1986) (footnote omitted).

delay. It may even proceed with the early phases of a project before it completes the final design, in what is commonly called "fast track" construction. And, if labor disputes arise, it may sanction the use of reserve gates on its property (as the MWRA initially did here). But, as the court below concluded (Pet. App. 29a-30a), in pursuing its legitimate interest in the timely completion of work, the MWRA may not interfere with the construction industry employees' right to choose whether to organize and with the construction industry employers' right to compete free of secondary pressures exerted by third parties outside the construction industry.[4]

Contrary to the rhetoric of petitioners (Pet. Br. 18-19, 21-22, 28-30, 33-36) and, to a lesser extent, their *amici* (*see, e.g.*, U.S. Br. 14, 17-20), it is of no moment that, in so intruding into and interfering with rights conferred by the Act, the MWRA asserts the role of a proprietor and implements its agreements through bid specifications. This Court's preemption decisions make it clear that "the fact that the [government] acted through franchise procedures rather than a court order or a general law . . . is irrelevant to our analysis." *Golden State I*, 475 U.S. at 614 n.5.

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[4] We therefore have no reason to disagree with petitioners (Pet. Br. 35-36) that the Court's preemption decisions would not prevent a city from advising a supplier of taxi services that it will take its business elsewhere if interruptions in services caused by strikes are not halted. The city in such a situation is not singling out a business for special treatment simply because it is or is not unionized, and it is not requiring the supplier to accede to any union demands (since the supplier may, of course, elect to ensure uninterrupted services through the use of permanent replacements or other means). By contrast, the MWRA is singling out businesses for special treatment on the basis of whether they will agree to become signatory to a collective bargaining agreement, and it is requiring them, as a condition of bid eligibility, to accept the union's demands and to compel their employees to join the union. As the Solicitor General concedes (U.S. Br. 19-20 n.14), this Court's decisions would unquestionably require preemption of such state actions outside the construction industry -- *e.g.*, in the taxi service industry.

In fact, the Court has stated that "[t]o uphold [an otherwise improper state action] simply because it operates through state purchasing decisions . . . would make little sense." *Wisconsin Dep't of Industry v. Gould, Inc.*, 475 U.S. at 289. As the court below explained: "Allowing a state to impose restrictions upon *all* companies from which it purchases goods or services would effectively permit it to regulate labor relations between private employers and their employees[,] thus totally displacing the NLRA, not just in this Project, but also statewide, and, if the practice were to become generalized, nationally. Indeed, an anti-union state government could allow only non-union employers to bid on state projects, if the state-as-employer argument is to be taken to its extreme." Pet. App. 21a (emphasis in original).

It may be, as petitioners and the Solicitor General argue (Pet. Br. 33-35; U.S. Br. 18-20), that the Court in its prior cases was "not faced . . . with a statute that [could] even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs." *Wisconsin Dep't of Industry v. Gould, Inc.*, 475 U.S. at 291. But the Court's NLRA preemption cases have consistently stated that "'judicial concern has necessarily focused on the nature of the activities which the State has sought to regulate, rather than on the method of regulation adopted.'" *Golden State I*, 475 U.S. at 614 n.5 (citations omitted). Moreover, as explained above (*supra*, at 13-14), while the states are entitled to respond to local procurement constraints and economic needs, this Court's preemption decisions make it clear that the states may not take any actions which conflict with the provisions of the NLRA or which interfere with the organizational and collective bargaining processes that are the subject of the Act. It is precisely for these reasons that the Solicitor General does "not contend . . . that a State's actions are automatically insulated from preemption under the NLRA whenever it acts as a purchaser of services or other market participant." U.S. Br. 19-20 n.14. Indeed, the Solicitor General concedes that the MWRA's actions here would be preempted if they had occurred "outside the construction industry" or were

otherwise inconsistent with Sections 8(e) or (f) of the NLRA. *Id.* Simply put, there is not, and cannot be, an intelligible exception drawn to NLRA preemption principles merely because the actions of a state government are proprietary in nature.

II. PETITIONERS AND THEIR *AMICI* PROVIDE NO PERSUASIVE REASONS FOR READING THE CONSTRUCTION INDUSTRY PROVISIONS OF THE NLRA TO INSULATE PUBLIC PURCHASERS OF CONSTRUCTION FROM FEDERAL PREEMPTION.

Just as he did in *Golden State I*, the Solicitor General joins with the local government and the relevant unions in arguing (U.S. Br. 14-29; Pet. Br. 18-19, 24-36) that some of a state's proprietary actions should nevertheless be immune from NLRA preemption. Specifically, the Solicitor General joins in the contention that Sections 8(e) and (f) of the NLRA permit private property owners/developers to enter into and enforce project labor agreements. From this basic premise, the Solicitor General and petitioners reason that this Court cannot reasonably interpret the NLRA to preempt state agencies, in their capacity as third-party purchasers of construction, from entering into and enforcing such agreements.

The proposition that the states may *compel* whatever the Act *permits* is frankly both troubling and dubious. Indeed, *Machinists* preemption is designed precisely to prevent the states from so dictating the choices of private parties in the labor-management relations arena. *See Wisconsin Dep't of Industry v. Gould, Inc.*, 475 U.S. at 290-91. No less significant, however, is that the Solicitor General and the petitioners proceed from a false premise: Sections 8(e) and (f) do not authorize private property owners/developers, in their capacity as third-party purchasers of construction, to enter into and enforce project labor agreements.

A. The First Proviso To Section 8(e) And Section 8(f) Only Apply To Employers In The Construction Industry And To Agreements That Result From A Collective Bargaining Relationship.

Section 8(e) makes it an unfair labor practice for "any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees . . . to cease doing business with any other person . . . ." 29 U.S.C. § 158(e) (1988). The "construction industry proviso" to Section 8(e) states, however, "[t]hat nothing in this subsection shall apply to an agreement between a labor organization and *an employer in the construction industry* relating to the contracting or subcontracting of work to be done at the site . . . ." *Id.* (emphasis added). Section 8(f) provides that "[i]t shall not be an unfair labor practice . . . for *an employer engaged primarily in the building and construction industry* to make an agreement . . . with a labor organization of which building and construction employees are members . . . because . . . the majority status of such labor organizations has not been established . . . prior to the making of such agreement . . . ." 29 U.S.C. § 158(f) (1988) (emphasis added). Thus, a typical third-party purchaser of construction, like the MWRA, cannot find any right in Sections 8(e) or (f) to enter into and enforce a project labor agreement.

To begin with, a third-party purchaser does not normally satisfy the requirements of being "an employer in the construction industry" and "an employer engaged primarily in the building and construction industry." There is a consensus among the courts and the NLRB that, to satisfy both of these requirements, the employer's involvement in the construction project must be substantial and much like the normal involvement of a prime or general contractor. There must be evidence that the employer is managing and coordinating the methods, techniques or procedures of construction through employees that it places at the job site. *See, e.g., Clark v. Ryan*, 818 F.2d 1102, 1107 (4th Cir. 1987); *A.L. Adams Constr. Co. v. Georgia Power Co.*, 733 F.2d 853,

854 & n.3, 858 (11th Cir. 1984), *cert. denied*, 471 U.S. 1075 (1985); *Operating Eng'rs Pension Trust v. Beck Eng'g & Surveying*, 746 F.2d 557, 562-64 (9th Cir. 1984). Merely engaging general contractors, providing funding for construction activity, and periodically visiting the construction site for purposes of inspection is not enough. *See A.L. Adams Constr. Co. v. Georgia Power Co.*, 733 F.2d at 854 n.3; *see also, e.g., NLRB v. W.L. Rives Co.*, 328 F.2d 464, 469 (5th Cir. 1964); *Carpenters Local 1149 (American President Lines, Ltd.)*, 221 N.L.R.B. 456, 460-61 (1975), *enf'd.*, 81 Lab. Cas. (CCH) ¶ 13,137 (D.C. Cir. 1977); *Forest City/Dillon-Tecon Pac.*, 209 N.L.R.B. 867, 868, 870-71 (1974), *enf'd in part*, 522 F.2d 1107 (9th Cir. 1975); *Local 1937, Painters and Glaziers Dist. Council No. 51 (Prince George's Center, Inc.)*, 183 N.L.R.B. 37, 38 (1970); *Columbus Bldg. & Constr. Trades Council (Kroger Co.)*, 149 N.L.R.B. 1224, 1225-26 (1964); *Frick Co.*, 141 N.L.R.B. 1204, 1208 (1963). Just as a home owner that engages a general contractor to build a home or to remodel a kitchen is not "an employer in the construction industry" and "an employer engaged primarily in the building and construction industry," neither is the MWRA.

Indeed, a third-party purchaser of construction which, like the MWRA, has no bargaining relationship with any construction industry labor unions cannot plausibly claim the status of a construction industry employer within the meaning of Sections 8(e) and (f). The text of these statutory provisions does not even arguably extend to actions by third-party purchasers of construction. Moreover, this Court has long recognized that the construction industry proviso to Section 8(e) applies only to agreements between a construction industry employer and a union with whom the employer has a collective bargaining relationship. *Connell*, 421 U.S. at 621-635. *See also Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 652-54 (1982); *Donald Schriver, Inc. v. NLRB*, 635 F.2d 859, 873-882 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 976 (1981).

Specifically, in *Connell*, this Court held that subcontracting agreements between a construction industry union and "stranger" contractors -- *i.e.*, contractors with whom the union had no collective bargaining relationship and whose employees the union had no interest in representing -- were not sanctioned by the construction industry proviso and could be challenged under the NLRA and the antitrust laws. 421 U.S. at 626-35. In *Connell*, such a union had picketed certain general contractors with whom it had (and sought) no collective bargaining relationship in an ultimately successful effort to obtain the agreement of those contractors to let subcontracts only to firms that were parties to the union's collective bargaining agreement. *Id.* at 618-19. This Court determined that "[t]his kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions." *Id.* at 625. After finding that "[o]ne of the major aims of the 1959 Act was to limit 'top-down' organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees," the Court further determined that the statute's "careful limits on the economic pressure unions may use in aid of their organizational campaigns would be undermined seriously if the proviso to § 8(e) were construed to allow unions to seek subcontracting agreements, at large, from any general contractor vulnerable to picketing." *Id.* at 632, 633. Accordingly, this Court held that the proviso's "authorization extends only to agreements in the context of collective bargaining relationships" and that the proviso did not immunize the challenged agreement or, for that matter, the picketing that preceded it. *Id.* at 633. *See also id.* at 637 n.19.

The facts of this case are even more extreme than the facts of *Connell*, where the employers could at least be said to be "in the construction industry." The MWRA cannot satisfy even that threshold requirement. Further, it has no collective bargaining relationship with any of the construction industry unions that are members of the Trades Council; and the Master Labor Agreement expressly excludes MWRA's employees from its coverage. Pet.

App. 114a-116a. Moreover, the Trades Council has no discernible interest in representing MWRA's employees in the future. Rather, the union is seeking to represent those who work for private construction employers that are bidders on work from the MWRA. Pet. App. 112a. Indeed, as in *Connell*, it was prior picketing and ensuing work stoppages by members of the Trades Council that led MWRA to agree with the Trades Council to dictate the terms and conditions of all labor relations on the Boston Harbor project. Pet. App. 4a.

Even more importantly, the effects of the MWRA's actions are at least as pernicious as those decried in *Connell*. By agreeing with the Trades Council to require all of the participants in a $6.1 billion market for new construction to recognize the Trades Council, the MWRA has facilitated a massive effort by the Trades Council to organize construction employees from the "top down," irrespective of their wishes. Moreover, the MWRA has allowed the Trades Council to use its monopoly power over labor to prevent open and unrestricted competition by all qualified contractors, in disregard of the cost of the Boston Harbor project for the consumers and taxpayers who ultimately will pay for it. *Connell* makes it clear that the construction industry proviso does not authorize such "top-down" organizing through a "stranger" employer, or any other direct extension of labor's limited statutory monopoly power into the end-product market. *See* 421 U.S. at 624-26, 632-33; *see also Woelke & Romero Framing*, 456 U.S. at 663-64; *Larry V. Muko, Inc. v. Southwestern Pennsylvania Bldg. and Constr. Trades Council*, 609 F.2d 1368, 1372-75 (3d Cir. 1979) (*en banc*), *cert. denied*, 459 U.S. 916 (1982); T. Campbell, *Labor Law and Economics*, 38 Stan. L. Rev. 991, 1033 (1986) (*Connell* stands for the proposition that a union may not direct pressure "against a *consumer* of the services provided by the employer with whom the union has a bargaining relationship, unless the union is seeking to organize the employees of such a consumer" (emphasis in original)).

B. Sections 8(e) And (f) Of The NLRA Do Not Allow Third-Party Purchasers Of Construction To Enter Into Agreements With Construction Industry Unions To Limit Competition Among Construction Industry Employers.

Amazingly, petitioners and their *amici* do not even discuss the limitations of the construction industry proviso to Section 8(e) or the equally express limitations of Section 8(f). Nor do they mention *Connell* or its holding that the construction industry proviso to Section 8(e) does not extend to agreements that lie outside any collective bargaining relationship. Indeed, they offer no persuasive reasons for inferring that Congress intended to allow third-party purchasers of construction, public or private, to agree with construction industry labor unions to dictate the labor relations of other employers.

1. Petitioners and their *amici* principally argue (Pet. Br. 20, 24-26, 28-29; U.S. Br. 17-18, 21-22, 22-24) that, since the pre-hire agreement between Kaiser and the Trades Council is lawful, the MWRA's agreement with the Trades Council to enforce that agreement must be as well. In the process, however, they disregard their own frequent admissions that Kaiser is not deciding what work to contract or to subcontract, or to whom. Rather, it is the MWRA that makes all of the contract awards. What lies at the heart of this case are the restrictions that the MWRA has agreed with the Trades Council to impose on the selection of contractors working in Boston Harbor. Since the MWRA has no collective bargaining relationship of its own with the Trades Council and is not a construction industry employer, the MWRA cannot properly claim that its actions are directly immunized under the Section 8(e) proviso and Section 8(f). Moreover, since the Master Labor Agreement makes it clear (Pet. App. 116a) that Kaiser and the MWRA are not "joint employers" (*i.e.*, employers whose operations, employees and control are so intermingled that they may legally be treated as one), the MWRA cannot properly claim that any coverage of Kaiser by the construction industry proviso or Section 8(f) may be imputed to

it. *See South Prairie Constr. Co. v. Operating Eng'rs Local 627*, 425 U.S. 800, 802-804 (1976); *Limbach Co. v. Sheet Metal Workers Int'l Ass'n.*, 949 F.2d 1241, 1260-63 (3d Cir. 1991).

2. Petitioners and their *amici* object (Pet. Br. 20, 24-26; U.S. Br. 21-22, 22-23) that the MWRA exerts no economic pressure on any contractor, subcontractor or employee other than the pressures that inhere in the Master Labor Agreement itself, and then argue that it makes no sense to exclude the MWRA's agreement with the Trades Council to enforce the Master Labor Agreement from the intended coverage of the proviso. This objection ignores the fact that, as a third-party purchaser of construction, especially on a project of this type and size, the MWRA can bring enormous economic pressures to bear on private construction employers -- far above and beyond any pressure that an ordinary general contractor in a collective bargaining relationship with a union can exert. The MWRA has the power to debar and to accept higher prices at the taxpayers' or consumers' expense. *See Larry V. Muko, Inc.*, 609 F.2d at 1372-76; *see generally* Campbell, 38 Stan. L. Rev. at 1032-36. Indeed, it was the potential for excessive secondary pressures that led the Court in *Connell* to hold that a restrictive "hot cargo" agreement with a "stranger" employer is outside the construction industry proviso to Section 8(e). *See Connell*, 421 U.S. at 624-26, 632-33.[5]

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[5] Contrary to petitioners' suggestion (Pet. Br. 28-29), it makes no difference whether there is a source of law that would prohibit persons subject to the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, from entering into such restrictive third-party arrangements (although, given the availability of the antitrust laws, we see no reason to concede the point). This Court made it clear in *Machinists* and *Garmon* that, even though public agencies are not "employers" within the meaning of NLRA Section 2(2), and thus not directly subject to the NLRA's prohibitions, the Supremacy Clause makes their actions subject to NLRA preemption. By contrast, RLA employers are not subject to the Supremacy Clause or, because of NLRA Section 2(2), the prohibitions

3. Petitioners and their *amici* further err in suggesting (Pet. Br. 20, 24-26, 35-36; U.S. Br. 21-22, 22-23) that, if MWRA's actions are held to fall outside the sphere of conduct contemplated by the proviso to Section 8(e) and Section 8(f), third-party purchasers will be denied the right to choose to purchase construction from contractors which have entered into project labor agreements. The MWRA has not, however, made a unilateral decision to purchase construction from contractors that have entered into a project labor agreement. Rather, as petitioners have acknowledged (*see* Pet. Br. 25-29; *see also* J.A. 41), and as the dissent below presumed (*see* Pet. App. 32a ("In return for the MWRA's promise to insist that contractors sign the agreement, the Council has promised the MWRA labor peace throughout the 10-year life of the construction project")), the MWRA has agreed with the Trades Council to condition contract awards on recognition of the Trades Council and acceptance of the labor agreement negotiated by Kaiser and the Council. It is this agreement to organize construction industry employees from the "top down" and to exclude from the bidding competition employers that do not agree to recognize the union that conflicts with the provisions and policies of the NLRA and is preempted.[6]

4. Petitioners and their *amici* protest (Pet. Br. 13-15, 18, 30-33; U.S. Br. 24-28) that Sections 8(e) and (f) were intended to preserve the status quo regarding agreements between unions and employers in the construction industry in 1959 and, further, that project labor agreements between construction industry unions and public and private property owners/developers were pervasive at that time. It is clear that Congress wanted to preserve the

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of the NLRA.

[6] Contrary to the argument of petitioners and the Solicitor General (Pet. Br. 36; U.S. Br. 29), finding preemption here does not mean the end of project labor agreements on public construction projects. It simply means that private construction employers will retain the responsibility for such agreements.

pattern of collective bargaining that existed in the construction industry in 1959. *See Woelke & Romero Framing*, 456 U.S. at 657. But the available evidence does not support the claim that property owners/developers were routinely entering into "hot cargo" agreements with unions in 1959.

Petitioners and their *amici* principally cite to the legislative history of Sections 8(e) and (f) to support their claim that the pattern in the industry in 1959 included such third-party arrangements. *See* Pet. Br. 30-33; U.S. Br. 24-28. But the legislative history at most supports only the proposition that project labor agreements were used on both public and private construction projects. While there is some evidence that some public agencies viewed project labor agreements between construction industry employers and unions as desirable in some contexts, the legislative history does not provide *any* examples of project labor agreements that were subject to the approval of the third-party purchaser and were enforced by that purchaser. On the contrary, as best we can tell from the legislative record, all of the examples brought to Congress' attention were classic subcontracting agreements between a general construction contractor and a union with whom that contractor had a collective bargaining relationship.[7]

Petitioners also cite to two secondary sources and a 1986 Advice Memorandum of the Associate General Counsel of the NLRB to support their claim that the pattern in the industry in 1959 included third-party arrangements like the one in issue here. *See* Pet. Br. 13-15, 18. But the secondary sources and the

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[7] It is not clear whether any of the agreements described in general terms in the legislative history cited by petitioners (Pet. Br. 30-33) were as extensive and detailed as the agreement between Kaiser and the Trades Council. Thus, petitioners overstate the degree to which the legislative history supports their assertion that the pattern in the construction industry in 1959 included agreements like the one between Kaiser and the Trades Council.

Advice Memorandum merely suggest that, in some situations, property owner/developers may have supported the use of project labor agreements. These sources do not establish how frequently property owners/developers have done so, whether the owners were mere third-party purchasers when they did so (as opposed to "employers in the construction industry"), or whether the owners/developers had collective bargaining relationships with the unions with whom those project labor agreements were negotiated. These sources thus cannot begin to establish that, in 1959, the accepted industry pattern included agreements that, as here, were conditioned on a third-party purchaser's approval and were to be enforced by a third-party purchaser that had no collective bargaining relationship with the union.[8]

Indeed, the available evidence suggests that such arrangements were not part of the industry pattern in 1959. The Court in *Connell* expressly determined that "stranger" contractor arrangements did not exist in abundance, if at all, in 1959. *See Connell*, 421 U.S. at 627-33. Moreover, both this Court and industrial relations experts have since suggested that this was a "novel organizing tactic" that first developed in the early 1970s.

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[8] The Mills quote (*see* Pet. Br. 13-14), published in 1972, cites absolutely no authority for its assertion and gives no indication of the extent of the purported "involvement" of the owner. *See* D. Q. Mills, *Industrial Relations and Manpower in Construction* 40 (1972). The Labor Department study (*see* Pet. Br. 14) expressly states that the agreements discussed "are multicraft agreements, generally signed by the local building trades council and/or all local unions involved, and by the *prime contractors* on the project." U.S. Department of Labor, Labor Management Services Administration, *The Bargaining Structure in Construction: Problems and Prospects*, at 14 (1980) (emphasis added). The Advice Memorandum similarly involves a 1980s project labor agreement between a union and a prime contractor; moreover, no unfair labor practice charge was filed against the owner and the Advice Memorandum expresses no opinion about the propriety of the owner's actions. *See* Pet. App. in No. 91-261, at 98a-99a, 101a-102a.

See Woelke & Romero Framing, 456 U.S. at 653-54 n.8; T. St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 Va. L. Rev. 603, 628 (1976). And, finally, the fact that no case concerning the legality of this kind of third-party purchaser arrangement arose until the mid-1980s reinforces the view that this practice is, in reality, a relatively recent phenomenon.

5. Finally, petitioners err in suggesting (Pet. Br. 36) that Bid Specification 13.1 is not preempted because private construction employers have the option of seeking other work. The fact remains that Section 8(e) prohibits this kind of secondary coercion by a third-party purchaser of construction. It was enacted precisely so that construction industry and other employers would not be faced with such coercion (and so that their employees would be protected against this kind of "top-down" organizing tactic). While the construction industry proviso to Section 8(e) and Section 8(f) create a limited exception, *Connell* makes it clear that the congressional policies against secondary boycotts and "top-down" organizing require that "stranger" arrangements like the one in issue here be excluded from the exception. Thus, it is the petitioners, and not the decision below, who "err[] not, as may often happen, by nudging congressional enactments or legal doctrines somewhat too far, but by abruptly and unaccountably standing them on their head." Pet. Br. 36.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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Nos. 91-261 and 91-274

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT,
Petitioner

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et al.*

MASSACHUSETTS WATER RESOURCES AUTHORITY and KAISER ENGINEERS, INC.,
Petitioners

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et al.*

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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On Writs of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE* [1]

The Chamber of Commerce of the United States of America ("the Chamber") is a federation consisting of approximately 200,000 companies and several thousand other organizations such as state and local chambers of commerce and trade and professional associations. It is the largest association of business and professional organizations in the United States. A significant aspect of the Chamber's activities involves the representation of the interests of its member-employers in employment and labor relations matters before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs *amicus curiae* in a wide spectrum of labor relations litigation before the Court.[2]

This case presents the issue whether a State may prescribe the terms of private labor relations and agreements whenever it invokes its interest as a purchaser of goods or services. Through the simple expedient of labeling all state purchases as "proprietary" actions, Petitioners Massachusetts Water Resources Authority ("MWRA"), Kaiser Engineers, Inc. ("Kaiser"), and the Building and Construction Trades Council ("Union") seek to avoid controlling precedent which has consistently held that the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (1988) (the "Act" or "NLRA"), preempts government interference with the representation and col-

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[1] This brief is filed with the written consent of all parties as provided in Rule 37.3 of the Rules of the Supreme Court of the United States. Copies of those consents are on file with the Clerk of the Court.

[2] *E.g., Gade, Director, Illinois Environmental Protection Agency v. National Solid Wastes Management Association*, No. 90-1676 (U.S. June 18, 1992); *The District of Columbia v. Greater Washington Board of Trade*, No. 91-1326 (U.S., filed July 8, 1992); *Lechmere v. NLRB*, 112 S. Ct. 841 (1992).

lective bargaining processes governed by the Act.[3] In reaching its decision, the Court should reject Petitioners' argument that a State as a purchaser of goods and services, *i.e.*, a "market participant", is generally free from NLRA preemption. The court below properly applied long-standing principles of law and its decision should be sustained.

Because of certain pending litigation, the Chamber has an immediate concern for the continued vitality and force of this Court's precedents that establish the freedom of the private sector collective bargaining process from governmental interference. The Chamber is the appellee in a case pending before the Ninth Circuit Court of Appeals in which the district court held that the NLRA preempted a county ordinance which purported to require the payment of union-negotiated wage and benefit rates by wholly private employers in the construction industry. *Associated Builders & Contractors v. Baca*, 769 F. Supp. 1537 (N.D. Cal. 1991).[4] The district court properly found such direct intervention by the county into the collective bargaining process to be preempted by federal

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[3] *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959) ("*Garmon*"); *Local 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976) ("*Machinists*"); *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986) ("*Golden State I*"); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989).

[4] At issue in *Baca* is a county ordinance entitled "Prevailing Wages for Industrial Construction" ("Ordinance"), adopted on August 21, 1990. *Baca*, 769 F. Supp. at 1540. The Ordinance directed private employers to pay "not less than the per diem wage" to "all construction workers" on private construction projects worth more than $500,000.00 in unincorporated areas of Contra Costa County. Ord. § 526-2.802. *Id.* By state law, these mandated wage and benefit amounts are set by reference to union-negotiated wage and benefit rates. *Id.* at 1545.

law, and therefore unlawful. *Id.*[5] Although the instant case arises in a somewhat different context,[6] the principle which the district court in *Baca* applied from this Court's cases would be seriously eroded if the judgment below is overturned on the theory advanced by Petitioners.

On the face of things, it is difficult to see why a State's purchasing interest is different in kind from any number of other sovereign interests in providing services to its citizens that a State might advance to support its selective usurpation of the collective bargaining process. Whatever the merit of Petitioners' argument that the State is entitled to special prerogatives where it can invoke the market participant rationale, it is plain that the scope of state and municipal purchases of goods and services is sufficiently pervasive that, if accepted, this rationale would result in a major segment of labor relations being withdrawn from the exclusive governance of the Act.

Therefore, the Chamber files this brief in support of Respondent in order to assist the Court in its consideration of the issues in the case.

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[5] The district court invalidated the county Ordinance on three grounds: preemption by the NLRA because of its direct intrusion into and regulation of the collective bargaining process (*Baca*, 769 F. Supp. at 1545); preemption by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (1988) ("ERISA") because of its reference to and connection with ERISA-covered plans (*Baca*, 769 F. Supp. at 1547); and violation of the Contract Clause because the Ordinance would have abrogated existing collective bargaining agreements which did not meet its mandated wage and benefit terms. (*Id.* at 1547).

[6] The Ordinance in *Baca* was not limited to situations in which a state or local government was necessarily the beneficiary of the particular goods or services being generated.

COUNTER-STATEMENT OF THE CASE

The basic facts are set out in the opinion of the court below and will not be rehearsed at length in this brief. Petitioners have, however, with rhetorical flourish, placed inordinate emphasis on certain issues and facts which *amicus* believes to be largely beside the point. Thus, Petitioners' conception of the case and of the issues presented requires some response to place the relatively straightforward legal principles which ought to govern this case into clear focus.

Specifically, *Petitioners* seek to emphasize:

1. *That the project for which the State here sought to mandate a particular bargaining relationship, and the full scope of the terms and conditions of employment, was initiated as a result of a federal court order and a federal deadline, imposed as a consequence of the State's earlier failures to comply with federal law.* Pet. Br. 3, 6, 25-26. Although these background facts are apparently highlighted to demonstrate a significant State interest in the timely completion of the Boston Harbor project, *amicus* is willing to assume that important state interests can be said to underlie virtually any state project or purchase, including this one. No substantive argument is made why the general benefits of this project should affect the Court's analysis of preemption questions.

2. *The size, duration and "magnitude" of the project.* Pet. Br. 4-6, 25-26. Petitioners apparently emphasize the scope of the project to establish the State's interest in this particular project and in maintaining its vision of stable and satisfactory labor relations. But the size of this project only serves to emphasize the practical effects of state contracting decisions on what are indisputably *private* firms marketing privately produced goods and services. Purchases by state and local governments from the private market are a significant feature of our economy. Any right granted to state government to im-

pose a particular labor relations framework on that market would cut a broad swathe through the NLRA. The question is not whether the Boston Harbor clean-up project is important to the State; presumptively, it is. Rather, the issue is whether the importance of the project gives the State license to emasculate federal rights under the NLRA.

3. *That the State decided to impose the regime of labor relations in this case on the basis of advice received from a private firm, here, Kaiser Engineers.* Pet. Br. 6.[7] *Amicus* is willing to assume that any time a state or local government may decide to intervene in private labor relations, such intervention would be the product of considered expert advice, or perhaps the weighing of competing advice from different sources. Nonetheless, *amicus* does not consider it appropriate to base a *preemption* analysis on the fact that the State was advised in any particular case to take the position it did, or who provided the advice and for what reason. Contrary to Petitioners' model, preemption analysis turns on whether a State has impermissibly interfered with federally protected rights, not *who* recommend that it do so. Quite properly, "State officials . . . regulate in accordance with the views of the local electorate," not to further federal interests. *New York v. United States*, 112 S.Ct. 2408, 2424 (1992). The record in this particular case may not directly demonstrate the interplay of *political* forces and pressures which led to the initial negotiation of the

[7] The United States takes comfort in arguing throughout its brief that "[i]ndeed, the project labor agreement at issue here actually was negotiated and entered into by Kaiser Engineers, the private construction manager that MWRA selected." Br. for U.S. at 19. More realistically, Petitioners concede that "economic forces" "caused *MWRA and the* [*Union* to] each balance[] costs and benefits to reach an outcome both consider economically beneficial. . . . [T]he Agreement provides [MWRA] with legally enforceable assurances." Pet. Br. 25 (emphasis added). *See also* Memorandum to James F. Snow, Jt. App. at 92-93.

Labor Agreement. But it is inevitable in our democracy that if the Court declares this field open to state intervention, both labor and management will avail themselves of the political process and lobby state officials concerning labor arrangements to be imposed on construction projects, and in other fields in which state and local governments act as purchasers. In each such case, private labor relations will be held hostage to the political powers of persons and organizations with no direct relationship to those at the bargaining table. *See Golden State I*, 475 U.S. at 610-11.

4. *That the particular set of requirements and the special labor-management relationship which the State here imposed is a form of labor relationship that would not violate the Act if arrived at by private parties.* Pet. Br. 18, 24-26. The issue here is not whether these arrangements would be lawful if agreed upon by private parties in the construction industry; the issue is whether the State has the power to impose these arrangements on private parties. While it is true that the particular form of labor relationship at issue may be *permissible* under the Act, it is not *required* by the Act. It is permitted only when it is arrived at voluntarily by private parties in the exercise of other rights and obligations under the Act. The State can no more insist that private parties adhere to that particular relationship than prohibit the parties from adopting it.

5. *That the State is exempted from the NLRA.* Pet. Br. 27-30. The fact that the NLRA does not purport to regulate States *as employers* under the Act demonstrates congressional sensitivity to traditional notions of federalism. Under the constitutional scheme, the federal government does not normally regulate the States. On the other hand, as respects prescriptions and proscriptions on the actions of *private parties*, federal law is supreme and frequently bars the States from intervening to affect those actions as a simple matter of basic preemption.

6. *The fact that the State here has a "proprietary" interest as a market participant.* Pet. Br. 18-19. Although the State here happens to be acting as a purchaser of construction services, its potential interest as a "market participant" is pervasive. Many, if not most, state activities rely, at least to some extent, on contracting for goods and services provided by private industry. Petitioners do not distinguish between purchasing construction services for the Boston Harbor project and engineering and building services for roads. Nor does their argument admit a distinction between construction services, on the one hand, and the procurement of computers or computer services to operate the State's welfare program or tax collection mechanism, on the other. Moreover, it is difficult to see why a state's purchasing interests should be deemed paramount to other sovereign interests of the State in maintaining the public welfare. The State as a market participant is free to insist on its legitimate contractual rights as the purchaser of goods and services—to insist that the persons and entities with which it does business live up to their obligations. Such rights are far removed from the authority asserted here, under the guise of a purchasing decision, to interfere directly with private labor representational matters and collective bargaining.

SUMMARY OF ARGUMENT

The National Labor Relations Act establishes the federal government, through the National Labor Relations Board ("NLRB" or "Board"), as the only governmental arbiter of private labor relations and collective bargaining relationships in this country. On matters of collective bargaining and employee representation, the Board alone has authority over private employees and employers. The Act reflects a basic federal policy which intentionally leaves the outcome of the collective bargaining process to the free play of economic forces. That policy is antithetical to governmental prescription of the outcome of the bargaining relationship, or to governmental effort to

tip the balance in favor of one side or the other in that relationship.

Petitioners and the United States as *amicus curiae* argue that because the MWRA, a State agency, was acting in "a proprietary capacity—as a market participant," U.S. Br. 18, it "should have, if anything, more freedom than private parties in matters affecting labor relations, not less." Pet. Br. 19.[8] Petitioners are clearly wrong. Free collective bargaining—without government intervention and affected only by the potential use of economic weapons—lies at the heart of the rights protected by the NLRA. Whenever government places a hand on the balance scale between negotiating parties—whether by setting the contours within which the parties may bargain, limiting the availability of economic weaponry, or by pre-determining the results of that bargaining—it impedes the process Congress intended to leave wholly unregulated. Just as clearly, States have no business imposing collective bargaining representatives on private employees. The NLRA affords private employees—not state governments—the right to select "representatives of their own choosing." 29 U.S.C. § 157 (1988).

In this case, the State has imposed as pervasive a scheme of labor relations as one could imagine on those who would seek to compete for state contracts and participate in state projects. Bid Specification 13.1 specifies that *no* contractor may obtain work at the MWRA Boston Harbor project unless and until, "as a condition of being awarded a contract or subcontract," he or she agrees "to abide by the provisions of the Boston Harbor Wastewater Treatment Facilities Project Labor Agree-

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[8] Petitioners' argument that federal labor preemption applies only to "the narrow band of situations in which the state consciously seeks to deprive either an employer or its union of weapons in an existing labor dispute" is just wrong. Pet. for Cert. 16. This stingy reading of NLRA preemption was advanced by the Ninth Circuit in *Golden State* and specifically rejected by the Court. *Golden State I*, 475 U.S. at 612, 619.

ment." *Associated Builders & Contractors of Massachusetts v. Massachusetts Water Resources Auth.*, 935 F.2d 345, 347-348 (1st Cir. 1991) ("*MWRA*"). By its terms, the Labor Agreement nullifies any preexisting collective bargaining agreement to which a contractor and his employees' representative may be signatory. In addition, the use of economic weaponry throughout negotiations for each of the five successor Labor Agreements is prohibited. Any disagreement over terms will be submitted to interest arbitration, with the final result dictated by an outside third party and imposed by the State through its bidding requirements. Not only must all construction workers be referred by a Union hiring hall, but those employees must become members of the Union, pay Union dues, and accept the Union as their sole and exclusive bargaining representative. *Id.* at 348.

The State's imposition of these terms and representational requirements on private parties both eviscerates statutorily protected rights and subverts the federally-protected bargaining process. It makes no difference whether that collective bargaining agreement, *if chosen by private parties*, would be lawful or unlawful. What is prohibited—indeed, all that is covered by the doctrine of preemption and the reach of the Supremacy Clause—is coercive *governmental* action. The question presented here is not whether the private parties have acted lawfully, but whether the State may intervene as it did in the employment relations of private individuals.

Petitioners' and *amicus* United States' suggestion that the Court should nonetheless carve out an exception to the general rules of preemption whenever a State makes "proprietary" decisions simply cannot be reconciled with either the language or spirit of the NLRA. Preemption does not turn on a State's particular reason for regulating the relations of private parties. And while the State's relationship with its own employees is expressly exempted from the Act, this is simply an ordinary manifestation of well-recognized principles of federalism,

which preclude direct federal regulation of the States and their internal activities. There is no principled basis upon which to suggest that where the State's interest can be characterized as proprietary, its regulatory authority implementing that interest is entitled to an exemption from federal preemption.

Amicus does not question the State's freedom to act in its proprietary interest. It may choose to purchase cheaper goods. It may insist upon reliability by, and impose reliability standards on, its suppliers. But the State may not dictate the labor relations of its suppliers. That is an arena exclusively reserved to the parties and controlled by the policies of federal labor law.

Finally, the fact that this case involves a type of collective bargaining agreement that is permissible under Sections 8(e) and (f) of the Act does not alter the analysis. There are a host of activities, bargaining relationships and labor relations strategies that are specifically or implicitly permissible under the NLRA when adopted by private parties. But in no instance has the Court held that a State may require a private employer to bargain or refuse to bargain with a union, notwithstanding the fact that a private employer could independently do either. In sum, the unique context of this case—and the seeming benefits of the Section 8(f) agreement which the State prefers and therefore has *required*—do not change the fact that federal labor policy precludes States from imposing any form of labor representation or agreement on parties covered by the NLRA.

ARGUMENT

I. THE NLRA PREEMPTS THE STATE'S EFFORT TO IMPOSE ITS VIEW OF ACCEPTABLE LABOR RELATIONSHIPS AND TERMS AND CONDITIONS OF EMPLOYMENT ON PRIVATE PARTIES.

It is common ground that the National Labor Relations Act sets forth a comprehensive regulatory scheme under which labor relations are to be monitored and conducted. It is also well established that this federal scheme was intended to displace all forms of state interference with the policies and principles expressed by the Act. The Court has delineated two rules of NLRA preemption, both of which are implicated by the extraordinarily intrusive and comprehensive mechanism through which the State here attempts to dictate all aspects of labor relations at the Boston Harbor site. The *Machinists* rule "precludes state and municipal regulation 'concerning conduct that Congress intended to be unregulated.'" *Golden State I*, 475 U.S. at 614 (discussing *Machinists*, 427 U.S. 132). The second strand of preemption, the so-called *Garmon* rule, "is intended to preclude State interference with the National Labor Relations Board's interpretation and active enforcement of the 'integrated scheme of regulation' established by the NLRA." *Golden State I*, 475 U.S. at 613 (citing *Garmon*, 359 U.S. 236 (1959)). To that end, it prohibits States from regulating activity that the NLRA protects, prohibits, or arguably protects or prohibits.

A. The NLRA Preempts State Interference With The Collective Bargaining Process.

"'Free collective bargaining is the cornerstone of the structure of labor-management relations carefully designed by Congress when it enacted the NLRA.'" *Golden State I*, 475 U.S. at 619 (quoting *New York Tel. Co. v. New York State Dep't. of Labor*, 440 U.S. 519, 551 (1979) (Powell J., dissenting)). Grounded in the prem-

ise of "freedom of contract," (*H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970)), the " 'essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.' " *Id.* at 104 (quoting S. Rep. No. 573, 74th Cong., 1st Sess. 12 (1935)). The terms and conditions of employment are to be established by the parties themselves through the bargaining process, armed with the economic weaponry allowed under the Act and subject to the duties which the Act imposes.

The "fundamental premise" underlying the Act is that there should be "private bargaining under governmental supervision of the procedure alone, *without any official compulsion over the actual terms of the contract.*" *H.K. Porter*, 397 U.S. at 108.[9] *See also Golden State I*, 475 U.S. at 619 ("[e]ven though agreement is sometimes impossible, government may not step in and become a party to the negotiations"); *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 490 (1960) ("[o]ur labor policy is not presently erected on a foundation of government control of the results of negotiations"); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937) ("[t]he theory of the Act is that free opportunity for negotiation . . . may bring about the adjustments and agreements which the Act in itself does not attempt to compel"). As this Court admonished over three decades ago, States have no role to play in this federally-protected bargaining process:

> [T]here is no room in this scheme for the application here of . . . state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions. Since the federal law operates here, in an area *where its authority is paramount*, . . . *the inconsistent application of state law is necessarily outside the power of the State.*

Local 24, Int'l Bhd. of Teamsters v. Oliver, 358 U.S. 283, 296 (1959) (citation omitted).

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[9] Underscoring in quoted passages throughout this brief is added unless otherwise indicated.

In short, federal labor law requires state and local government neutrality in connection with private labor relations. Only "neutral" state laws which are "not directed toward altering the bargaining positions of employers or unions," (*Machinists*, 427 U.S. at 156 (Powell J., concurring)), *and* which are "unrelated *in any way* to the process of bargaining or self-organization" are permitted. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). "State laws should not be regarded as neutral if they reflect an accommodation of the special interests of employers, unions, *or the public* in areas such as employee self-organization, labor disputes, or collective bargaining." *Machinists*, 427 U.S. at 156, n.* (Powell J., concurring). Put simply, States may neither "encourage nor discourage the collective bargaining processes which are the subject of the NLRA," (*Metropolitan Life*, 471 U.S. at 755) or take actions that are "inconsistent with the general legislative goals of the NLRA" to foster employee free choice and free collective bargaining. *Id.* at 757. *Accord Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987).[10]

Specification 13.1., by which the State seeks to impose collective bargaining terms on unknown private employees and employers at the Boston Harbor site for the next ten years, conflicts with these most fundamental tenets of the NLRA. Indeed, "[f]or all intents and purposes the state here *eliminates* the bargaining process altogether." *MWRA*, 935 F.2d at 353 (emphasis in original). Through its bidding Specification, the State has transformed a particular collective bargaining agreement negotiated by its

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[10] In *Metropolitan Life* and *Fort Halifax* the Court focused on the *effect* of state regulation on the collective bargaining processes established by the NLRA. *Fort Halifax*, 482 U.S. at 20; *Metropolitan Life*, 471 U.S. at 758. The modest supplements to the terms and conditions of employment at issue in those cases escaped preemption only because they were laws of general applicability that "neither encourage[d] nor discourage[d]" this federal process. *Metropolitan Life*, 471 U.S. at 755.

agent [11] into a state regulation with the force and effect of state law. Moreover, it has for the future replaced the collective bargaining process with state-mandated "interest arbitration" to establish the terms and conditions of employment.

The effect of Specification 13.1 on NLRA-protected rights is clear and unambiguous.[12] *No* contractor may obtain work at the Boston Harbor project unless and until, "as a condition of being awarded a contract or subcontract", he or she agrees "to abide by the provisions of the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement." *MWRA*, 935 F.2d at 347-48. By its terms, the Labor Agreement nullifies any preexisting collective bargaining agreement to which a contractor and his employees' representative may be signatory. *Id.* Five successor Labor Agreements are contemplated during the term of the Boston Harbor project. Jt. App. at 41. The use of economic weaponry during these negotiations will not be permitted; rather, any disagreement over terms will be submitted to interest arbitration, with the final result dictated by an outside third party and imposed by the State through its bidding requirements. *MWRA*, 935 F.2d at 348. Not only must all construction workers be referred by the Union hiring hall, but those employees must become members of the Union, pay Union dues, and accept the Union as their sole and exclusive bargaining representative. *Id.*

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[11] *See* Memorandum to James F. Snow, Jt. App. at 92-93.

[12] The fact that the State has acted through a bidding specification rather than through a law of general application is irrelevant. First, Petitioners' argument that the State as purchaser is free to meddle into collective bargaining (and representational issues) admits no limitations—either to the Boston Harbor project or to construction contracts generally. Second, "'judicial concern has necessarily focused on the nature of the activities which States have sought to regulate, rather than on the method of regulation adopted.'" *Golden State I*, 475 U.S. at 614 n.5 (citations omitted).

Through these and other terms, imposed for the entire 10-year duration of the Boston Harbor cleanup, the State has asserted the right to: (1) impose a complete collective bargaining agreement, in derogation of any pre-existing contracts; (2) impose an exclusive representative on private employees who might be otherwise represented or have chosen not to be represented by a union; (3) require membership in a union not of the employees' own choosing; and (4) limit future bargaining through the imposition of interest arbitration. Its actions clearly interfere with the federally protected bargaining process and are preempted.

B. *Garmon* Preempts The State's Attempt To Impose A Collective Bargaining Representative Onto Private Employees.

Federal labor policy preempts state action whenever that action would interfere with the "primary jurisdiction" of the National Labor Relations Board. *Garmon*, 359 U.S. at 245. Concerns for state autonomy—of the kind argued by Petitioners and the United States in this case—had led to numerous decisions in which the Court "grappl[ed] with [the] pre-emption problem" of where to draw the line between state and federal jurisdiction over labor issues. *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 290 (1971). Ultimately, years of "experience—not pure logic" mandated the clear primacy of federal law. *Id.* at 291. In 1959, the Court articulated the now-familiar *Garmon* test:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, *due regard for the federal enactment requires that state jurisdiction must yield.* To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.

Garmon, 359 U.S. at 244. The selection of a collective bargaining representative—and the decision to refrain from collective activities—are explicitly protected by Section 7 of the Act.[13] Interference with these employee rights by either employers or unions constitutes an unfair labor practice.[14] *Garmon* precludes state interference with these rights and obligations.

The Labor Agreement enforced through Specification 13.1 imposes the signatory Union as the sole and exclusive collective bargaining representative of all construction workers who now—or who may in the future—work on the Boston Harbor project. *MWRA*, 935 F.2d at 348.[15]

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[13] 29 U.S.C. § 157 (1988).

[14] *See* Sections 8(a)(1) and 8(a)(2), 29 U.S.C. §§ 158(a)(1) and (2), and Section 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A).

[15] The United States concedes that no State could impose pre-hire recognition "as a condition of obtaining a state contract outside the construction industry" because it would violate employee rights under Section 7 of the Act. U.S. Br. 20 n.14. The Government argues that the State's action is permissible here because it is "confined to a single construction project" and because the employees themselves could later reject representation under the last proviso to Section 8(f). *Id.* The issue is not, however, whether this particular representation would or would not be lawful under the Act. The decisive inquiry under *Garmon* is whether this question of representation falls within the exclusive jurisdiction of the NLRB. It plainly does.

The unbridled scope of Petitioners' argument that States as market participants are not bound by the NLRA and are free to act in "matters affecting labor relations" raises the question whether the State would, in fact, consider itself limited by the last proviso in Section 8(f). Pet. Br. 19. Similarly unclear is whether the State would acknowledge the primacy of the Court's decisions in *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), or *Communications Workers v. Beck*, 487 U.S. 735 (1988). These decisions limit imposed union "membership" to its "financial core" (*General Motors*, 373 U.S. at 742) and to specific representational matters (*Beck*, 487 U.S. at 762-63). Petitioners do not explain the inherent inconsistency between their basic argument that States as "market participants" are not constrained by the NLRA and

Under that agreement, each and every construction worker must be referred by the Union hiring hall, become a member of the Union, pay dues to the Union, and accept the Union as a sole and exclusive bargaining representative. *Id.* For their part, employers must accept the agreement negotiated under state auspices just as if they had freely recognized and negotiated with the Union themselves.

Petitioners purport not to understand the First Circuit's suggestion that the imposition of a collective bargaining representative would " 'implicat[e]' the *Garmon* preemption principle." Pet. Br. 22-23 n.13. Their confusion is inexplicable. The court below quite clearly and accurately noted that Specification 13.1 "establishes recognition of the Trades Council . . . as the condition of the award of an MWRA bid." *MWRA*, 935 F.2d at 357. Thus, through the vehicle of its bidding requirements, the State has imposed a collective bargaining representative in derogation of protected employee rights under Section 7 of the Act. 29 U.S.C. § 157 (1988). This state "regulation of matters protected by § 7 of the Act" (*id.* at 355), falls squarely within the *Garmon* preemption rule. *Garmon*, 359 U.S. at 244 (neither federal nor state government can regulate activities "which . . . are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8").

Garmon does permit state action on matters which are "peripheral" to NLRA concerns. *Garmon*, 359 U.S. at 243. Assuredly, however, the exercise of Section 7 rights and the selection of a bargaining representative are "plainly within the central aim of federal regulation" and not peripheral in any way. *Id.* at 244. *Garmon* also permits States to act when the regulated conduct affects "interests so deeply rooted in local feeling and responsibility" that Congress did not intend preemption to apply. *Id.* Petitioners make no claim that Massachusetts has a

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acknowledgment that *some* aspects of federal labor law would nonetheless apply.

"deeply rooted" interest in the identity of the bargaining representative of workers it cannot presently identify for contracts it has not yet let.[16] Since Section 7 of the Act specifically protects the exercise of employee rights "to bargain collectively through representatives of their own choosing . . . and . . . to refrain" therefrom, and imposes sanctions for violation of these rights, the federal interest entirely supplants whatever showing Massachusetts might hope to advance.

II. THE COURT SHOULD NOT IMPORT A "MARKET PARTICIPANT" DOCTRINE INTO FEDERAL LABOR LAW.

Petitioners' and the United States' argument that a single construction project is all that is at stake here is disingenuous. Nothing in the Petitioners' "market participant" theory limits its application to "a single construction project" (U.S. Br. 20) or, realistically, to construction contracts at all.[17] *If* Massachusetts is freed by "principles of federalism" [18] from attention to federal

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[16] The State's interest is in timely completion of the project. While that interest may be important, it does not excuse the *means* adopted by the State to ensure that result. *MWRA*, 935 F.2d at 359 ("[i]t is not the clean-up, however, which is being regulated; collective bargaining is being regulated, and that cannot be").

[17] While the United States' primary argument appears to be that the construction context of the state activity involved here privileges imposition of a contract and bargaining representative, it also argues more broadly that "[p]rinciples of federalism counsel that an Act of Congress should not be construed to single out state and local governments for special regulatory burdens when they act in a proprietary capacity (and in a manner that is fully consistent with federal law), absent an explicit statement of congressional intent to that effect." U.S. Br. 14. This argument begs the question. The issue is whether the State can, "in a manner that is fully consistent with federal law," impose collective bargaining terms and representatives on private employees and employers as a cost of doing business with the State.

[18] U.S. Br. 14; Pet. Br. 36.

law when it spends public monies, those principles and that freedom must apply equally to other purchases and other laws as well. Petitioners simply seek to excuse *any* state action that interferes with collective bargaining and representational rights under the NLRA *whenever* the State can assert that it is taking such action because of its interest as the purchaser of goods or services.[19] The First Circuit quite correctly described the breadth of Petitioners' argument:

> If the state employer exclusion from the NLRA were interpreted to include all situations in which a state contracted for goods or services, the exception would likely swallow the rule. Allowing a state to impose restrictions upon *all* companies from which it purchases goods or services would effectively permit it to regulate labor relations between private employers and their employees thus totally displacing the NLRA . . . .

MWRA, 935 F.2d at 355 (emphasis in original). In all of these contexts, a state's determination of the labor

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[19] Pet. Br. 18 ("when states act in a purely proprietary capacity for purely proprietary reasons in the same manner as a private proprietor[,] the states are [not] foreclosed from action that directly affects collective bargaining by others"); at 19 ("the NLRA embodies an intent that, when the states act as persons engaged in proprietary conduct for proprietary reasons, they should have, if anything, more freedom than private parties in matters affecting labor relations, not less"); at 21 (NLRA does not "impose a limitation on a state's management of its own property when the state pursues its purely proprietary interests, and where analogous private conduct would be permitted"); at 27 (omission of states from the NLRA statutory definition of an employer "strongly suggests that state proprietary actions . . . do not run afoul of the Act").

It should be noted that the United States, as *amicus*, does not support the full breadth of Petitioners' argument: "We do not contend, of course, that a State's actions are *automatically* insulated from preemption under the NLRA whenever it acts as a purchaser of services or other market participant." U.S. Br. 19 n.14.

relations relationship that best serves state interests would wholly eviscerate private parties' federally protected rights to make those decisions themselves.

A. Labor Preemption Does Not Distinguish "Regulatory" And "Proprietary" State Actions.

The "bright line" that Petitioners attempt to draw between regulatory and proprietary actions does not, in fact, exist. State action by its very nature—whether by legislation, formal rules, or the exercise of its purchasing power—has a coercive effect on individuals and businesses that no private party could obtain. Regardless of its form, state action must be evaluated under the same standards of preemption that apply whenever the State might "frustrate the federal scheme." *Metropolitan Life*, 471 U.S. at 747.

Thus, Petitioners' argument is not only directly contrary to every labor preemption decision of the Court, but it ignores the regulatory scheme by which the State can "enforce" its "purchasing" decisions against private parties. Specification 13.1 has the power and force of the Commonwealth of Massachusetts behind it. Indeed, Massachusetts law would debar any contractor who failed to comply fully with the Specification from future state contracts. Mass. Gen. Laws Ann., ch. 29, §§ 29F(2)(iii) (West 1982 and Supp. 1992) (debarment proper for "a record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more public contracts").[20] Through its bidding requirements, therefore, the State has not only dictated that a specific

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[20] Debarment is defined by state law as "exclusion from public contracting or subcontracting for a reasonable, specified period of time commensurate with the seriousness of the offense." Mass. Gen. Laws Ann., ch. 29, § 29F(a). For the length of a debarment, "public contracts shall not be awarded and . . . offers, bids, or proposals shall not be solocited." Mass. Gen. Laws Ann., ch. 29, § 29F(b). Specification 13.1 applies " 'in the same manner as any other provision of the contract.' " *MWRA*, 935 F.2d at 348.

collective bargaining agreement be adopted, that specific union representation be accepted by employees and recognized by employers, and that pre-negotiated terms and conditions apply; it has also given those dictates the force and effect of state law with its own peculiar and far-reaching remedies for breach.

Petitioners attempt to rewrite the Court's decisions by perceiving a heretofore unknown "intent" embodied in the NLRA to give States "more freedom than private parties", to "directly affect[] collective bargaining *by others*," whenever the State makes a purchasing decision. Pet. Br. 18-19. There is no such intent. The States have broad authority over their own labor relations but the States were left with no power to impose their will on the labor relations of "others," by which *amicus* understands Petitioners to mean private employers and their employees. It is not at all surprising that the Act bars the State from exercising coercive power to impose its will on private citizens, while allowing those citizens themselves to use whatever economic power is at their disposal against other private citizens. Government is treated differently under preemption analysis, just as it is with respect to any number of other constitutional requirements. This Court has emphasized that "[t]he Act treats state action differently from private action not merely because they frequently take different forms, but also because in our system States simply are different from private parties and have a different role to play." *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 290 (1986).

> [G]overnment occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints. Outside the area of Commerce Clause jurisprudence, it is far from unusual for federal law to prohibit States from making spending decisions in ways that are permissible for private parties.

Id.

In short, it is irrelevant that a private construction contractor, operating under the terms of the NLRA, may lawfully sign a pre-hire collective bargaining agreement. Congress simply did not "intend[] to allow States to interfere with the 'interrelated federal scheme of law, remedy, and administration under the NLRA as long as they did so through the exercises of the spending power." *Id.* (citation omitted).[21]

Government is indeed different and it is not surprising that it is treated that way. Voters elect local and state representatives according to the voters' interests and priorities. Once in office, every elected official attends carefully to the views expressed by constituents. Public democracy is expected to work in this manner. Just so, the NLRA was established to create a system of industrial democracy which would be responsive to the interests and views of the employees in each bargaining unit and under which terms and conditions would be established by market forces, not government edict.

B. Petitioners' "Market Participant" Theory Would Allow A System Of Labor Relations By Political Edict.

A decision for Petitioners would open the doors to the politicization of private labor relations—precisely the evil Congress sought to avoid when it prescribed a regime of (1) employee self-determination and (2) wages, hours and conditions of employment governed by the market. If decisions about who should represent employees and on what terms they should work can be set by the State, it

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[21] The United States as *amicus curiae* argues that *Gould* is inapplicable because *Gould* involved *Garmon* preemption and this case involves *Machinists* preemption. U.S. Br. 20 n.15. The simplicity of the analysis is attractive but it overlooks the fact that the Court relied on *Gould* in deciding *Golden State I* (475 U.S. at 618), in the context of a *Machinists* preemption analysis. *Id.* at 618 n.8. As the court below correctly concluded, "both forms of preemption are implicated." *MWRA*, 935 F.2d at 352.

is inevitable that representatives of labor and management will seek to persuade government officials to exercise their power to set those terms in favor of one side or the other. Such a result is a predictable part of our political process. The Court has seen how constituent pressures affect the actions of local politicians (*Golden State I*, 475 U.S. at 611), and the Court has consistently sought to insulate private employment relationships from such political pressures. It has stated unequivocally that the NLRA, not state law or politics, "comprehensively deals with labor-management relations from the inception of organizational activity through the negotiation of a collective-bargaining agreement." *English v. General Electric Co.*, 110 S.Ct. 2270, 2279 n.8 (1990).

The loudest voices or biggest donors to a public official's campaign cannot, of course, be relied upon to determine the bargaining representative and set terms and conditions of employment for private employees without subverting the workplace democracy constructed by Congress. Indeed, even honest political debate in city council chambers or state legislatures cannot supersede the principles of representational democracy and economic warfare contemplated under the Act. Congress determined that the States were incapable of protecting employee rights and, on that basis, enacted the NLRA. *Id.* at 2279 n.8 (the impetus for passage of the NLRA was "Congress' perception that the NLRA was needed because state legislatures and courts were unable to provide an informed and coherent labor policy") (citing *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 286 (1971)).

A State unquestionably has a legitimate interest in the effective and efficient completion of public works. And it is not helpless to protect that legitimate interest. Here, for example, the thrust of the state's concern lies in the timetable which was imposed for completion of the Boston Harbor project because of previous inattention to environmental standards. Pet. Br. 3-4, 6. Given that concern, the State could require potential contractors to

submit a plan for the avoidance of interruptions to the project schedule, and determine who would be awarded bids according to the assurances received.[22] The State could also require adequate bonds or other commitments to ensure that the job is completed on time. It could require detailed submissions to ensure that a contractor had adequate numbers of workers with adequate skills to perform to the state's satisfaction.

What the State cannot do is to specify how "matters affecting labor relations" are to be resolved. Pet. Br. 19. When a State affirmatively takes steps that dictate a particular labor relations climate or result—whether "pro-union" or "anti-union"—the federal interest in collective bargaining free from "official compulsion" is defeated. *H.K. Porter*, 397 U.S. at 108.

Just as critically, a State must remain absolutely neutral on representational issues. Whatever the state's interest may be in the cost components of a collective bargaining agreement or in the avoidance of disruptions and strikes, it can advance *no* legitimate interest to justify imposition of a particular exclusive bargaining representative on employees. Such an intrusion into federally-protected rights bears no relationship to the performance of contractual obligations in the sale of goods or services to a State.

Taken to its obvious conclusion, Petitioners' argument would allow a State, in its guise as proprietary market participant, to supplant the NLRB election process and the free negotiation of collective bargaining agreements. For instance, a State could:

- Refuse to do business with any employer that is not signatory to a union contract; or

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[22] Thus, the Court has previously noted that it did "not say that state purchasing decisions may never be *influenced by* labor considerations." *Gould*, 475 U.S. at 291. However, to be "influenced by" labor considerations is a far different matter than to affirmatively exert state regulation onto labor relations matters.

- Refuse to do business with any employer whose employees are represented by a union, in order to avoid any interruption to state interests if contract negotiations resulted in a strike; or
- Refuse to contract with any employer whose employees did not agree to waive their right to renegotiate their collective bargaining agreement, or the right to strike, for the duration of the public work; or
- Set employment terms that meet the state's image of what is "best" and deny state contracts to any employer who does not insist upon identical terms in collective bargaining negotiations and refuse demands for any different combination of wages and benefits; or
- Require the abrogation of collective bargaining agreements that do not meet state standards, as a cost of doing business with the State; or
- Identify "preferred" unions and award state work to employers so organized.

In sum, a "market participant" exception to NLRA preemption, into which Petitioners would insert the Boston Harbor Labor Agreement, promises to confuse still more the difficult area of federal labor preemption "without yielding anything in return by way of predictability or ease of judicial application." *Lockridge*, 403 U.S. at 291. If a State, through the simple expedient of invoking its purchasing power, can require private parties to come to terms on bargaining representatives and a collective bargaining agreement—or lose state business altogether—"it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract." *Insurance Agents*, 361 U.S. at 490. The realities of the pressures on contractors in Boston are similar in kind, but greater in degree, than those that were impermissibly imposed on Golden State Transit Company. *See Golden State I*, 475 U.S. at 611. This state action directly implicates individual employee rights under Sec-

tion 7 and is plainly contrary to the teachings of *Garmon*. Expanded state power to regulate private labor relations through its purchasing decisions should be rejected by the Court as both unwise and unworkable.

III. THE FACT THAT THE STATE IS EXEMPT FROM DIRECT REGULATION UNDER THE ACT NEITHER ALTERS NOR AFFECTS THE PREEMPTION ANALYSIS.

Our system of federalism confers delegated powers on the national government but preserves state autonomy in several important respects. Pursuant to its power "[t]o regulate Commerce . . . among the several States", U.S. Const., Art. I, § 8, cl. 3, Congress passed the National Labor Relations Act and assumed federal control of labor relations issues. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). However, out of careful respect for state sovereignty, Congress did not impose the strictures of the NLRA on state governments. Instead, the federal government acts " 'with ample power, *directly upon the citizens*' " and not upon or through the States. *New York v. United States*, 112 S.Ct. at 2421 (citation omitted) (emphasis in original). Consistent with the sensitivities inherent in mutual sovereignty, Congress did not attempt to impose the obligations of the NLRA on the States but, rather, explicitly removed the States from its coverage.

Without doubt, state and local governments are exempt from coverage by the NLRA. Petitioners argue that this exemption frees every State from any obligation to avoid intrusion into the rights and obligations of private parties, who are so covered. Pet. Br. 27. Petitioners have misconstrued the import of congressional silence and in doing so have inverted the logic of the statute.

Congressional regard for state autonomy extends to its intentional exclusion of the States from the scope of the Act. States, as employers, are freed from the obligations of the statute and ineligible to claim its benefits. It was unnecessary for the Act to "expressly prohibit" a State

from "engaging in any particular transaction" (Pet. Br. 27); the Supremacy Clause[23] prohibits state interference with the complex scheme devised by Congress. The very silence of the Act, which Petitioners tout, demonstrates the force of Congress' intention that States refrain altogether from interfering with federally protected rights.

Congress has occupied the field of private labor relations. No lesser government can interfere. Any state action which attempts to stake out a position on that field is improper and preempted.

IV. THE PRIVILEGES CONFERRED BY SECTION 8(f) DO NOT AFFECT THE PREEMPTION ANALYSIS.

The preemption question is similarly not affected by the fact that Sections 8(e) and 8(f) of the Act permit private parties voluntarily to enter into pre-hire agreements akin to the Labor Agreement enforced by the State here. The issue is whether it is lawful for state or local governments to require that they do so.

It is clear that the determinative preemption question cannot be whether the subject on which the State seeks to intervene *involves* Sections 8(e) and (f) of the Act. Petitioners do not even contend that this is an area in which the States are free to regulate at will. If that were the case, then the State would be free to prohibit construction contractors and unions from adopting such agreements.

The fact that proper Section 8(e) and 8(f) agreements are lawful if private parties freely agree upon them only serves to emphasize that state imposition of a pre-hire contract and bargaining representative cannot be permitted. One might hypothesize that a State required

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[23] "[T]he Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2.

adherence to an agreement which turned out *not* to be lawful under the Act because it was too broad in its scope (or for any other reason). The private parties to such an unlawful agreement presumptively would be subject to unfair labor practice charges and the jurisdiction of the Board. Would the fact that the State had mandated the practice somehow immunize the private parties from penalties because their conduct was not volitional, but imposed by the State? Or, in the alternative, should the State be joined as a party in the unfair labor practice proceedings? Either result would force the Board directly to regulate the State or to allow patently illegal conduct to continue.

Such an intrusion into state sovereignty through direct regulation would exacerbate federal-state conflict. Plainly, it would be antithetical to the clear division of state and federal authority delineated in this Court's cases and implicit in the Act. The line drawn by the Court has never been either situation- or motive-based. Congress provided no role for state government in the regulation of private labor relations which are under the jurisdiction of the NLRB; the Court ought not to allow incursions upon that rule. The broad, clear and well established principle that the States have no authority to prescribe the labor relations of private parties has long served to insulate the system of private labor relations from political pressure. It is also the only means to effectively prevent entanglement and direct confrontation between federal and state government.

CONCLUSION

The judgment of the court below should be affirmed.

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Nos. 91-261 and 91-274

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IN THE

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OCTOBER TERM, 1992

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT,
Petitioner,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et al.*,
Respondents.

MASSACHUSETTS WATER RESOURCES AUTHORITY, *et al.*,
Petitioners,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF AMICI CURIAE OF THE MERIT SHOP FOUNDATION, REPRESENTATIVE BILL PAXON, AND CERTAIN OTHER MEMBERS OF THE UNITED STATES CONGRESS IN SUPPORT OF RESPONDENTS

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On Writs of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF AMICI CURIAE OF THE MERIT SHOP FOUNDATION AND CERTAIN MEMBERS OF CONGRESS, REPRESENTATIVES BILL PAXON, RICHARD K. ARMEY, CASS BALLENGER, JOE BARTON, TOM DeLAY, WILLIAM L. DICKINSON, JOHN DOOLITTLE, ROBERT K. DORNAN, HARRIS W. FAWELL, WAYNE GILCHREST, JIM LIGHTFOOT, BOB LIVINGSTON, DICK NICHOLS, JIM SAXTON, DON SUNDQUIST, BARBARA VUCANOVICH, ROBERT S. WALKER, JOHN J. DUNCAN, JR., MELTON D. HANCOCK, THOMAS E. PETRI, FRANK RIGGS, DOUG BEREUTER, THOMAS J. BLILEY, JR., ANDY IRELAND, JIM RAMSTAD, AND CLIFF STEARNS, IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI

Amici curiae are the Merit Shop Foundation (the "Foundation") and concerned Members of Congress,[1] who are dedicated to maintaining the fundamental policies of the National Labor Relations Act (the "Act"), 29 U.S.C. § 151 *et seq.*, as adopted by Congress, protecting those policies of free enterprise from impermissible interference by state governments, and ensuring the integrity of the statutory construction of the Act. The Foundation and these Members of Congress are committed to ensuring that the bidding process for construction projects funded by tax dollars remains open, competitive, and available to "merit shop" contractors. The individual Members of Congress supporting this brief amici curiae are: Representatives Bill Paxon, Richard K. Armey, Cass Ballenger, Joe Barton, Tom DeLay, William L. Dickinson, John Doolittle, Robert K. Dornan, Harris W. Fawell, Wayne Gilchrest, Jim Lightfoot, Bob Livingston, Dick Nichols, Jim Saxton, Don Sundquist, Barbara Vucanovich, Robert S. Walker, John J. Duncan, Jr., Melton D. Hancock, Thomas E. Petri, Frank Riggs, Doug Bereuter, Thomas J. Bliley, Jr., Andy Ireland, Jim Ramstad, and Cliff Stearns.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Foundation and the Members of Congress submitting this brief strongly support respondents' arguments, which are consistent with the central congressional policies underlying the Act. Therefore, the decision of the First Circuit in *Associated Builders and Contractors of Massachusetts/Rhode Island, Inc. v. Massachusetts Water Resources Auth.*, 935 F.2d 345 (1st Cir. 1991), should be affirmed.

Preemption under the Act is clearly appropriate in this context under well-established precedent, both because

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[1] The parties have consented to the filing of this brief. Letters of consent are on file with the Clerk of the Court.

the activities of the Massachusetts Water Resources Authority ("MWRA") trample basic rights of employees under Section 7 of the Act and because the WMRA as a state entity has grossly intruded into the collective bargaining process protected by the Act. Although Congress has, within a narrow exception in the limited circumstance of the construction industry, permitted private employers to voluntarily enter into "pre-hire," or "project," agreements mandating union participation, Congress has not permitted government, be it a state or the National Labor Relations Board (the "Board"), to require that private employers enter into such agreements. Principles of fairness, openness, and free enterprise demand that, in particular, projects supported by public funds not be closed to the gamut of private employers, as has been done in the Boston Harbor matter by MWRA. The public interest requires the most cost efficient and effective use of government funds.

ARGUMENT

I. CONGRESS INTENDED TO DEFINE THE SCOPE OF FEDERAL LABOR LAW AND NOT ALLOW THE STATES TO UNDULY INTERFERE WITH ESSENTIAL WORKERS' RIGHTS AS THE MWRA HAS DONE.

Elemental policies of the Act, found in the congressional findings and declaration of policy, are to encourage the "practice and procedure of collective bargaining" and to "protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing. . . ." 29 U.S.C. § 151. These basic rights of employees to bargain collectively and to organize, as well as to *refrain* from doing so, are protected by Section 7 of the Act and have been since Congress adopted the Act more than fifty years ago;[2]

[2] "The [Act] requires an employer and a union to bargain in good faith, but it does not require them to reach agreement. § 8(d), as amended, 29 U.S.C. § 158(d) (duty to bargain in good faith

Congress did not intend that individual employees' rights be easily overcome.

Among the requirements imposed here by the MWRA are those that unilaterally appoint petitioner Building and Construction Trades Council ("Trades Council") as the designated collective bargaining agent for all craft employees working on the Boston Harbor project and mandate that all employees become union members within seven days of the start of their employment. A state entity such as MWRA is simply not permitted to contravene the collective bargaining process under the Act and interfere with workers' rights as MWRA has done here. The reason, of course, is not that the MWRA is subject to the Act's proscriptions; the Act clearly is not intended to apply to States.[3] Rather, Congress intended to preempt State's efforts to interfere in the collective bargaining process or with the protected rights of employees accorded under the Act. Preemption of such action traditionally has been based on States' attempted regulation of activities protected under Section 7 or regulated as an unfair labor practice under Section 8 of the Act, *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959), or on congressional intent simply to leave certain areas unregulated, *Lodge 76, Int'l Ass'n. of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n.*, 427 U.S. 132, 140 (1976).[4]

"does not compel either party to agree to a proposal or require the making of a concession")." *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 616 (1986) [*Golden State I*].

[3] The Act applies to "employers," defined specifically to exclude "any State or any political subdivision thereof. . . ." 29 U.S.C. § 152(2).

[4] " '[T]he congressional intent in enacting the comprehensive federal law of labor relations' required that certain types of peaceful conduct 'must be free of regulation.' . . . The *Machinists* rule creates a free zone from which all regulation, 'whether federal or state,' . . . is excluded. . . . The *Machinists* rule is not designed, as is the *Garmon* rule, to answer the question whether state or federal

In reaching its decision that the activities of the MWRA were preempted, the First Circuit focused on the latter *Machinists* rule. In particular, the Court of Appeals relied on this Court's decisions in the *Golden State* cases, which hold that *Machinists* preemption prevents regulation, either by a State or the federal government, of aspects of labor-management relations left unregulated by the Act. 493 U.S. at 112-113. In *Golden State I*, this Court held that the City of Los Angeles' action in conditioning renewal of an employer's operating franchise on settlement of a labor dispute was preempted by the Act, because it "entered into the substantive aspects of the bargaining process to an extent Congress has not countenanced." 475 U.S. at 615-616 (citations omitted). In *Golden State II*, this Court reaffirmed that state interests must be subordinate to the basic principle of free collective bargaining.

The State's action here must be preempted, because it even more directly interferes with central concerns of the Act than the City of Los Angeles' action in *Golden State*. The City of Los Angeles' intrusion into the collective bargaining process in *Golden State* merely attempted to regulate the employee's use of one of its economic weapons, the right to strike. As a state entity, MWRA's intrusion here actually requires that an agreement be reached and then mandates what its terms will be. Indeed, as the Court of Appeals concluded, the state's intrusion here "for all intents and purposes . . . *eliminates* the bargaining process altogether." 935 F.2d at 353. MWRA, by directly infringing affected workers' central rights of self-organization and designating representatives of their own choosing, has taken action that the Congress intended to leave free from state regulation.

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regulations should apply to certain conduct. Rather, it is more akin to a rule that denies either sovereign the authority to abridge a personal liberty." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 111-112 (1989) [*Golden State II*] (quoting *Machinists*, 427 U.S. at 153, 155).

II. CONGRESS DID NOT INTEND THE ACT TO AUTHORIZE STATES TO ENTER INTO PROJECT LABOR AGREEMENTS.

Under limited exceptions to the Act, Congress has permitted "employers" in the construction industry to take certain actions that would otherwise be illegal, such as enter into project agreements establishing labor terms and union recognition for all contractors and subcontractors working on a project. The fact that private employers may take such actions is irrelevant to the preemption issue here. It is *not* the legality of the project agreement that is in dispute; rather, what is contested is the legality of the state requirement imposed by MWRA establishing recognition of a union and signing of a master labor agreement as a condition of awarding a government project bid.

To the contrary, Congress clearly distinguishes between States and private parties. Sections 8(e) and 8(f) refer only to "employers" and Section 2(2) of the Act makes clear that "employer" "shall not include . . . any State or political subdivision thereof." Thus, the plain language of Sections 8(e) and (f) underscores Congress' intent to cover private employers only. As the Court of Appeals concluded, "the silence as to permitted state regulation is deafening." 935 F.2d at 357. Because States are expressly excluded from these limited exceptions for the construction industry, petitioner cannot plausibly argue that it may take advantage of the exceptions and implement project agreements, particularly in the face of the *Machinists* preemption doctrine.

Congress obviously meant to treat state and private entities differently in these matters. Indeed, this Court has previously emphasized the state/private distinction: "The Act treats state action differently from private action not merely because they frequently take different forms, but also because in our system States simply are different from private parties and have a different role

to play." *Wisconsin Dept. of Indus., Labor and Human Relations v. Gould*, 475 U.S. 282, 290 (1986).

The *Golden State* cases further highlight this differentiation. The city's conduct there, in conditioning renewal of a transportation carrier's franchise on settlement of a labor dispute by a specific date, admittedly would have been permissible if done by a private purchaser of that carrier's services. This Court nevertheless held that the city's action in this regard constituted *governmental* interference with collective bargaining and was, therefore, preempted by the Act. Inasmuch as the MWRA is an arm of the state, the Court of Appeals—based on this Court's holdings in *Gould* and *Golden State I*—rightly concluded that "the private employer comparison merits little weight." 935 F.2d at 358.

Finally, it must be observed that allowing States to enter into labor agreements requiring all union labor could effectively dismantle the scheme of the Act as carefully adopted by Congress. As pointed out by the Court of Appeals, allowing States to regulate in this reserved area would amount to "totally displacing" the Act. *Id.* at 355.

III. THE STATE REGULATION AT ISSUE THREATENS THE FAIR USE OF FEDERAL FUNDS FOR GOVERNMENT CONSTRUCTION PROJECTS.

The state regulation in this case seeks to deny open shop contractors the right to bid on government projects, such as the Boston Harbor Project, unless they are willing to waive their right to negotiate their own labor agreements and force their employees to be organized and represented by a representative not of their own choosing. Such governmental action may significantly reduce competitiveness in the bidding process for government projects funded by public tax dollars. This anti-competitive result could lead to more public money being needed to fund government construction projects, an unnecessary luxury that simply cannot be afforded in these economic

times. Further, it is simply not fair to a non-union employer or employee to allow this type of roadblock constructed by the MWRA to effectively prevent them from participating in the project. The amici Members of Congress, as keepers of the public trust, are deeply troubled by this disregard for the fair use of taxpayers' funds and urge that MWRA's action be halted so that merit shop contractors are not effectively precluded from working on public projects.

CONCLUSION

The Judgment of the First Circuit Court of Appeals should be affirmed and the action of the MWRA declared to be preempted by the National Labor Relations Act.

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MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, INC., PETITIONERS

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE MASTER PRINTERS OF AMERICA AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

The National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, provides for comprehensive regulation of the relationships between employees, employers and unions in the private sector. Sections 8(e) and 8(f) of the NLRA, 29 U.S.C. § 158(e) and (f), contain narrow exceptions to the general rules prohibiting an employer from agreeing to restrict its subcontracting to union signatory employers or from entering into a collective bargaining agreement with a union that does not represent a majority of its employees. These exceptions are expressly limited to employers "in the construction industry" and to employers "engaged primarily in the building and construction industry," respectively, and to agreements meeting very specific qualifications. The question presented is:

Whether a state agency, which is not otherwise subject to the regulatory mantle of the NLRA and which does not directly employ any construction employees, may nevertheless claim the privilege of entering into collective bargaining agreements under Sections 8(f) and (e) of the NLRA, or otherwise adopt policies which interfere with the federally regulated labor relations practices of those with whom it contracts.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-261

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, PETITIONER

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

No. 91-274

MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, INC., PETITIONERS

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF THE MASTER PRINTERS OF AMERICA AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE MASTER PRINTERS OF AMERICA

The Master Printers of America ("MPA") is a division of Printing Industries of America, an international, not-for-profit trade association, representing commercial printing establishments in the graphic arts industry throughout the U.S. and Canada. MPA itself represents approximately 8,500 members, whose employees are either wholly or partially union-free.

MPA is dedicated to serving these members through the development of positive employee relations programs, and making these programs available to its members.

If the Court were to adopt Petitioners' argument in this case, states would be allowed to restrict their contracting practices based upon the labor relations policies of the parties with whom they contract. MPA's interest in this litigation is to insure that its members are not arbitrarily and improperly excluded from the right to bid and perform state financed projects solely because of their status as non-union employers.

STATEMENT OF THE CASE

The Massachusetts Water Resource Authority ("MWRA") is an agency of the Commonwealth of Massachusetts. It is responsible for providing water supply services and sewage collection treatment and disposal services for the eastern half of Massachusetts. As part of its obligation to supply these services the MWRA is responsible for overseeing and implementing the court ordered clean-up of the Boston Harbor ("Boston Harbor Project"). *See, generally, United State v. Metropolitan District Commission*, 757 F. Supp 121 (D.Mass.), *aff'd*, 930 F.2d 132 (1st Cir. 1991). The actions of the MWRA in fulfilling its duties are governed by various state laws requiring, *inter alia*, that the MWRA provide the funds for construction, own the property to be built, establish all bid conditions, decide all contract awards, pay the contractors, and generally exercise controls over all aspects of the project. See, generally, Mass. Gen. Laws, Ch. 92, § 1-1, *et seq.*, and the Commonwealth's public bidding laws, Mass. Gen. Laws, Ch. 149, §§ 45 A-45L and Ch. 30, § 39M.

In April 1988 the MWRA selected Kaiser Engineers Inc. ("Kaiser") as its construction manager for the Boston Harbor Project. In this capacity, Kaiser is responsible for overseeing, on behalf of the MWRA, the construction of the new treatment

facilities and the upgrading of existing facilities needed for the court ordered clean-up.

Initially, work on the project began using both union and non-union contractors. However, on May 22, 1989, Kaiser, acting as MWRA's agent, entered into the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement ("Project Agreement") with the Building and Construction Trades Council of the Metropolitan District and various affiliated unions ("Trades Council" or "Petitioners"). This Project Agreement recognizes the Trades Council as the representative of all construction employees on the project and establishes the terms and conditions of employment for the life of the 10 year project. The agreement covers all contractors and subcontractors on the project, and it contains a union security clause and provisions for union hiring halls. It is undisputed that this Project Agreement was entered into "on behalf of" the MWRA and that all of the terms of the Project Agreement were approved by the MWRA prior to its execution. It is also undisputed that the agreement contains requirements which are unlawful under the NLRA unless they satisfy the exceptions set forth in Sections 8(f) and (e) of the National Labor Relations Act. 29 U.S.C. § 158(f) and (e).

In order to implement the Project Agreement, the MWRA adopted Specification 13.1 which requires any successful bidder for project work, as a condition of being awarded the work, to execute and abide by the terms of the Project Agreement between the MWRA and the Trades Council. This specification effectively precludes any contractor from being awarded any work on the Boston Harbor Project, whether union or non-union, unless it agrees to waive its rights under the NLRA to determine its own labor relations policies.

In March 1990, the Associated Builders and Contractors of Massachusetts/Rhode Island and six of its affiliates ("Respondents"), brought this action in the United States District Court

for the District of Massachusetts challenging both Specification 13.1 and the Project Agreement. On April 11, 1990, the District Court denied Respondents' request for a preliminary injunction and an appeal followed. On October 24, 1990, a unanimous panel of the Court of Appeals for the First Circuit reversed the District Court and issued a preliminary injunction against enforcement of the Project Agreement by the MWRA through any bid specifications which require private contractors to waive their statutory bargaining rights as a condition for working on the Boston Harbor project. The Court of Appeals granted rehearing *en banc* and, on May 15, 1991, a 3-2 majority of the Court of Appeals reaffirmed the panel decision. *Associated Builders and Contractors of Massachusetts/Rhode Island, Inc., et al. v. The Massachusetts Waste Resources Authority, et al.*, 935 F.2d 345 (1st Cir. 1991).

Both the panel opinion and the majority below found that the state agency's enforcement of the "union only" project agreement was pre-empted by the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* Although the court found that the actions of the MWRA implicated pre-emption principles under both *Garmon*[1] and *Machinists*,[2] the majority of its analysis focused on the latter principles. Relying upon this Court's teaching in the *Golden State Transit Corp. cases*,[3] the Court found that the MWRA had improperly interfered with the collective bargaining process by imposing the Project Agreement upon any contractor seeking to work on the Boston Harbor clean-up. The Building and Construction Trades Council and the MWRA filed petitions for certiorari on August 12 and 13, 1991. On May 18,

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[1] *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

[2] *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976).

[3] *Golden State Transportation Corporation v. City of Los Angeles*, 475 U.S. 608 (1986) [*Golden State I*] and *Golden State Transportation Corporation v. City of Los Angeles*, 493 U.S. 103 (1989) [*Golden State II*].

1992, this Court granted the petitions and consolidated the cases for argument.

When distilled to its essence, Petitioner's argument is that the Massachusetts Water Resource Authority, acting as a so-called "market participant," should be allowed the same latitude as private parties to enter into contracts or otherwise restrict its contracting practices in such a way to exclude potential contractors whose labor relations policies do not conform with government ordained criteria. Because private sector employers under certain circumstances are allowed to restrict their contracting practices based upon the labor relations policies of the parties with whom they contract, the legal vindication of such a ruling could result in the total exclusion of non-union employers and their employees from bidding on and fulfilling contracts by the state or divisions thereof in those jurisdictions where the state or local government officials felt so inclined. Accordingly, the ruling sought by Petitioners would nullify prior Court precedent prohibiting state or local authorities from interfering in labor relations policies of private employers and their employees within their jurisdictions.

SUMMARY OF ARGUMENT

I. "MARKET PARTICIPANT" DOCTRINE IS INAPPLICABLE UNDER THE NATIONAL LABOR RELATIONS ACT, 29 U.S.C. § 151, *ET SEQ.*

In *Wisconsin Department of Industry, Labor and Human Relations et al. v. Gould Inc.*, 475 U.S. 282 (1986), the Court rejected the so-called "market participant" doctrine as a defense to pre-emption under the National Labor Relations Act (NLRA) 29 U.S.C. § 151 *et seq.* In urging the reversal of the *en banc* opinion of the court of appeals below, Petitioners urge a revisionist interpretation of *Gould* and a re-emergence of the "market participant" doctrine under the NLRA. In support of their argument, Petitioners quote out of context selected phrases

from the Court's decision in *Gould*. However, when viewed in its proper context, it is clear that the language in the Court's opinion was not preserving any aspect of the "market participant" doctrine under the NLRA. Rather, the Court merely was emphasizing that its rejection of the "market participant" doctrine should not be read as modifying the existing principles for pre-emption.

II. TRADITIONAL PRE-EMPTION ANALYSIS

The majority below correctly found that the MWRA's actions in this matter negotiating, executing, and implementing the project agreement at issue in this case implicates pre-emption under both *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) and *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976). *Garmon* pre-emption is implicated because the MWRA, through Specification 13.1 and the underlying Project Agreement which it enforces, sought to interfere with the fundamental rights of employees under the National Labor Relations Act to decide whether to "join, form, or assist a labor organization," as well as their right to participate in the collective bargaining process which has established the terms and conditions of their employment for the next ten years.

Machinists pre-emption is implicated because the MWRA has interfered with the rights of Respondents and other private sector contractors to determine in the first instance how to order their labor relations. The legislative history of Section 8(f) of the National Labor Relations Act clearly demonstrates that pre-hire agreements were intended to be entirely voluntary. Thus, although Congress intended to allow such agreements, employers were to be free from government or union coercion in determining whether, or under what conditions, to enter into such agreements. Clearly, such a voluntary decision on the part of private employers is a matter which Congress chose to protect

and leave free from state regulation. *Golden State Transit Corporation v. City of Los Angeles*, 475 U.S. 608 (1986).

III. EVEN ASSUMING THE "MARKET PARTICIPANT" DOCTRINE HAS SOME APPLICATION UNDER THE NLRA, PETITIONERS' "MARKET PARTICIPANT" ANALYSIS IS FATALLY FLAWED.

Even assuming, *arguendo*, that some aspect of the "market participant" doctrine survived *Gould*, the analysis of Petitioners is fatally flawed in several respects. First, the MWRA cannot be considered a "market participant" under any reasonable definition or interpretation of that concept. The "market" in which the MWRA seeks to be a "participant" is heavily regulated by the NLRA; however, unlike its private sector counterparts who comprise this market, the MWRA is not regulated by the NLRA at all. Moreover, the MWRA is not driven by the same market forces as private sector participants in this market. The MWRA is subject to political pressure and other influences which do not effect private sector employers. Lastly, in contrast to private sector employers, the MWRA is spending taxpayer-generated funds. Thus, as a matter of fundamental fairness, the MWRA should not be able to exclude certain contractors/employers and their employees from public works projects based solely upon labor relations choices lawfully made by these employees which are fully protected under the NLRA.

In addition, Petitioners' "market participant" argument is based upon the underlying premise that a private sector property owner would be allowed to enter into a contract such as that entered into by-the MWRA. However, there is no legal precedent for this proposition. Indeed, there is no authority whatsoever that a private property owner who itself employs no construction employees may enter into and enforce an agreement under Sections 8(f) and (e) of the National Labor Relations Act. To the contrary, the NLRB General Counsel previously has authorized a complaint in a case where the employer did not

hire and did not intend to hire any construction employees. *See Building & Trades Council*, NLRB Case No. 1-CE-71 (NLRB-GC June 25, 1990), note 12 and accompanying text (reprinted as Appendix D at BCTC Pet. App. 83a-88a), citing *Plumbers Union Local 246 (Marlin Mechanical, Inc.)*, NLRB Case No. 32-CE-52 (NLRB-GC January 31, 1989) (original complaint reprinted as Appendix A hereto).

The final flaw in the "market participant" argument is that limiting the state to contracts allowed under the NLRA to private sector employers would in fact be subjecting states to NLRA regulation, a proposition which Congress specifically rejected. Petitioners would measure the lawfulness of state spending decisions by the criteria applicable to private sector employers, thus allowing states to enter into any contract allowed to a private sector employer and denying this right where it would be denied to private sector employers. Under such a rule, state agencies, such as the MWRA, would be *de facto* subject to the National Labor Relations Act. This would be directly contrary to the express intention of Congress in excluding such agencies from the definition of employer in Section 2(2) of the Act.

ARGUMENT

I. "MARKET PARTICIPANT" DOCTRINE IS INAPPLICABLE UNDER THE NATIONAL LABOR RELATIONS ACT, 29 U.S.C. § 151, *ET SEQ.*

A. The So-Called "Market Participant" Doctrine Does Not Constitute An Exemption To The Application Of Traditional Pre-Emption Principles Developed Under The NLRA.

In challenging the decision below, Petitioners make the superficially appealing, but erroneous argument that the Massachusetts Water Resource Authority, as a so-called "market participant," should be allowed to enter into any contract or otherwise adopt contracting practices which would be legally

permissible if adopted by private sector employers. However, this Court previously has rejected the "market participant" doctrine as a defense to pre-emption under the National Labor Relations Act. *Wisconsin Department of Industry, Labor and Human Relations, et al. v. Gould Inc.*, 475 U.S. 282 (1986). Petitioners urge a revisionist interpretation of *Gould* and a reemergence of the "market participant" doctrine as an exception to pre-emption under the NLRA.

In *Gould*, the Court was asked to adjudicate the validity of a Wisconsin statute debarring repeat violators of the National Labor Relations Act from doing business with the state. In holding that the Wisconsin statue was pre-empted by the NLRA, the Court specifically rejected Wisconsin's argument that its status as a "market participant" privileged its conduct. The Court stated

> [T]he 'market participant' doctrine reflects the particular concerns underlying the Commerce Clause, not any general notion regarding the necessary extent of state power in areas where Congress has acted.
>
> * * * *
>
> What the Commerce Clause would permit States to do in the absence of the NLRA is thus an entirely different question from what States may do with the Act in place. Congressional purpose is the 'ultimate touchstone' of pre-emption analysis . . . and *we cannot believe that Congress intended to allow States to interfere with the 'interrelated federal scheme of law, remedy, and administration' . . . under the NLRA as long as they did so through exercises of the spending power.*

475 U.S. at 289-290 (citations omitted, emphasis added).

The Court specifically rejected the state's argument that the statute should be upheld since the conduct in question was not prohibited to private sector employers under the Act.

> Nothing in the NLRA, of course, prevents private purchasers from boycotting labor law violators. But *government occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints.* Outside the area of Commerce Clause jurisprudence, it is far from unusual for federal law to prohibit States from making spending decisions in ways that are permissible for private parties.
>
> * * * *
>
> *The NLRA, moreover, has long been understood to protect a range of conduct against state but not private interference.*
>
> * * * *
>
> The Act treats state action differently from private action not merely because they frequently have different forms, but also because in our system *States simply are different from private parties and have a different role to play.*

475 U.S. at 290 (citations omitted, emphasis added).

In urging the Court to resurrect the "market participant" doctrine under the NLRA, Petitioners focus on the Court's caveat in *Gould* that "[w]e do not say that state purchasing decisions may never be influenced by labor considerations." However, the quote is taken out of context, omitting key language demonstrating that the Court did not intend its caveat to preserve the "market participant" doctrine as a defense to preemption under the NLRA. The full quote reads:

> We do not say that state purchasing decisions may never be influenced by labor considerations, *any more than the NLRA prevents state regulatory power from ever touching on matters of industrial relations.* Doubtless some state spending policies, like some exercises of the police power, address conduct that is

> of such 'peripheral concern' to the NLRA, or that implicates 'interests so deeply rooted in local feeling and responsibility,' that pre-emption should not be inferred. *Garmon*, 359 U.S., at 243-244; see also, e.g., *Belknap, Inc. v. Hale*, 463 U.S. 491, 498 (1983). And some spending determinations that bear on labor relations were intentionally left to the States by Congress. *See, New York Tel. Co. v. New York State Labor Dept.*, 440 U.S. 519 (1979). But Wisconsin's debarment rule clearly falls into none of these categories. We are not faced here with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs, or with a law that pursues a task Congress intended to leave to the States.

475 U.S. at 291 (emphasis added).

Taken in context, the Court's caveat, far from announcing any new exemption to basic pre-emption principles, merely affirms that its rejection of the "market participant" doctrine does not alter existing pre-emption rules which under certain circumstances allow state action of "peripheral concern" to the NLRA or which involves "deeply rooted" state interests. No such circumstances are involved in the instant case.[4]

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[4] These generally recognized exceptions to the pre-emption doctrine simply do not apply in the instant case. The power of a state to interfere with the freedom of choice guaranteed employees under the NLRA goes to the very heart of the federally regulated scheme of labor relations. In the instant case the state's purchasing power is being used in such a way as to penalize employees for exercising their right to remain union-free by depriving them of the opportunity to work on state funded projects. Such an ability to thrust itself into the federally-protected decision making process of employees subject to the NLRA clearly constitutes an action which is more than a peripheral concern of the federal statute and, indeed, strikes at the very core of the NLRA's free choice guarantees. Nor does the purchasing power of the state, as evidenced in the instant case, involve such "deeply rooted" state interests as to fall within the pre-emption exceptions.

In summary, in *Wisconsin Department of Industry v. Gould, supra*, the Court clearly drew a parallel under the NLRA between a state's regulatory power and its spending power. In either case, the Court held that the traditional pre-emption analysis is to be applied. Contrary to Petitioner's argument, the "market participant" doctrine does not provide a mechanism for escaping this traditional pre-emption analysis. Thus, the action of the MWRA in negotiating, executing & implementing the instant project agreement which seeks to control the labor relations policies of bidders and potential bidders remains subject to a traditional pre-emption analysis under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) and *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), and their progeny.

II. TRADITIONAL PRE-EMPTION ANALYSIS

Applying the analysis which this Court has employed in previous pre-emption cases, it is clear that the instant case meets standards which have been laid down for the application of the pre-emption doctrine and does not fall into any of the doctrine's recognized exceptions.

Pre-emption under the National Labor Relations Act has evolved under two distinct lines of cases. The first, known as Garmon pre-emption, see *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), prohibits states from regulating "activity that the NLRA protects, prohibits or arguably protects or prohibits." *Wisconsin Department of Industry v. Gould Inc.*, 475 U.S. 282 (1986). Garmon pre-emption is intended to preclude state interference with the Labor Board's interpretation and active enforcement of the "integrated scheme of regulation" established by the NLRA. *Golden State Transportation Corporation v. City of Los Angeles*, 475 U.S. 608 (1986). A second line of reasoning, known as Machinists pre-emption, see *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), precludes state and municipal regulation

"concerning conduct that Congress intended to be unregulated." *Metropolitan Life Insurance Company v. Massachusetts*, 471 U.S. 724 (1985).

The majority below correctly found that the action of the Massachusetts Water Resource Authority in negotiating, executing and implementing the project agreement at issue in this case implicates both forms of pre-emption.

A. Pre-emption Under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

A Garmon analysis begins with a determination as to whether or not the state action in question impacts upon an activity "that the NLRA protects, prohibits, or arguably protects or prohibits." See *Gould*, *supra*. If the conduct with which the state has sought to interfere is actually protected by federal law, "pre-emption follows not as a matter of protecting primary jurisdiction, but as a matter of substantive right." *Brown v. Hotel Employees Union Local 54*, 468 U.S. 491 (1984). If the conduct is only arguably protected by federal law, a balancing test is utilized to determine whether the conduct is of such "peripheral concern" to the NLRA or whether it involves "interests so deeply rooted in local feeling and responsibility" that pre-emption should not be inferred. *Garmon*, 359 U.S. at 243-244; see also e.g., *Belknap Inc. v. Hale*, 463 U.S. 491, 498 (1983).

Even a cursory examination of Specification 13.1, and the underlying Project Agreement which it enforces, demonstrates beyond debate that the action of the MWRA in negotiating, executing and implementing the project agreement impinges on important Section 7 rights of employees. The NLRA's fundamental precept is based on the premise that:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own

> choosing . . . and shall also have the right to refrain from any or all such activities. . . .

29 U.S.C. § 157.

Article III of the Project Agreement recognizes the signatory unions as the exclusive representative of all construction employees within the scope of the agreement, and compels covered employees, as a condition of employment, to become a member of a signatory union within a specified time period. Thus, the MWRA, through Specification 13.1, has eviscerated the Section 7 rights of project employees to decide for themselves which, if any, labor organization should be their representative. By virtue of this agreement, these same employees have also been denied the fundamental right to decide whether to "join, form or assist [a] labor organization[s]" - and in the process have forfeited their right to participate in the collective bargaining process which has pre-determined their terms and conditions of employment for the next ten years.

It is likewise a well-recognized principle of the National Labor Relations Act that an employer commits an unfair labor practice by dealing with a union that does not have the support of a majority of the workers. See *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 737-738 (1961). As the Court noted in that case, "there could be no clearer abridgement of Section 7 of the Act, assuring employees the right to bargain collectively through representatives of their own choosing or to refrain from such activity" than to grant exclusive bargaining status to an agency selected by a minority of the employees, *thereby imposing that agreement on the non-consenting majority*. *Id.* at 737.

Petitioners do not dispute that these important Section 7 rights have been compromised.[5] However, they assert that the

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[5] Petitioners declined to address pre-emption under *Garmon* in their brief. Nevertheless, Petitioners have attempted to export the "state interest" exception to pre-emption under *Garmon* to a *Machinists* analysis. Since the

actions of the MWRA should be judicially approved because a private sector employer would have been allowed to engage in this conduct. They further assert that this conduct is permissible as "a legitimate response to state procurement constraints or to local economic needs." Pet. brief at 34-35.

As to Petitioners' first argument in this respect, the alleged ability of a private sector employer to engage in similar conduct is irrelevant to a pre-emption analysis.[6] "The NLRA, moreover, has long been understood to protect a range of conduct against state but not private interference." *Gould*, 475 U.S. at 290. With respect to Petitioners' second contention, this Court's decision in *Brown v. Hotel Employees Union Local 54, supra*, makes it clear that no balancing of state interests is permissible where the state action in question interferes with conduct which is actually protected under the Act.

Even if a balancing of state interests were appropriate in this case, Petitioners misstate the focus of the balance to be made. In seeking to balance state interests against potential conflicts with national labor policy, the Court has sought invariably to identify the "legitimate and *compelling* state interest" to be protected. *Brown v. Hotel Employees Union Local 54*, 468 U.S. at 509 (emphasis added); *see also San Diego Building Trades Council et al. v. Garmon*, 359 U.S. at 247. Historically, such a compelling state interest has been found only in the case of violence, imminent and immediate threats to the public order, and combatting local crime which had infested a particular industry, none of which is applicable here. *Id.*

While the overall importance of the Boston Harbor cleanup project is not disputable, there is no showing that the project

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Court previously has refused to reach the question of whether this exception applies to a *Machinists* analysis, *Golden State Transit Corporation v. City of Los Angeles*, 475 U.S. 608, 618 note 8, we address Petitioners' arguments as part of a *Garmon* analysis.

[6] As discussed below, a similarly situated private sector property owner *could not* enter into a similar project agreement.

itself is at risk. This Court has never held that state interests in general are sufficient to justify the subordination of specifically protected employee rights embodied in the NLRA. Indeed, in this respect, this case is similar to *Bus Employees v. Missouri*, 374 U.S. 74 (1963), where the Court held that the state's general interest in providing uninterrupted transportation service to its citizens did not justify the state's prohibition of a strike by the unionized employees of a privately owned bus company.

By negotiating, executing and implementing the Project Agreement herein, the MWRA has directly interfered with crucial and critical rights of employees which the National Labor Relations Act specifically protects. In such situations in the past, this Court has not hesitated to find that the state's action was pre-empted by the NLRA, and it should do no less in the instant case. *San Diego Building Trades Council et al. v. Garmon*, 359 U.S. 236 (1959).

B. Pre-emption Under *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976).

A *Machinists* analysis begins with the recognition that the questioned state action concerns conduct which is neither protected nor prohibited by the National Labor Relations Act, but which Congress "intended to be unregulated." *Golden State Transit Corporation v. City of Los Angeles*, 475 U.S. 608, 614 (1986). The *Machinists* doctrine recognizes the integral nature of federal regulation under the NLRA, and protects those areas which Congress intentionally left "to be controlled by the free play of economic forces." *Machinists*, 427 U.S. at 140, quoting *NLRB v. Nash Finch Company*, 404 U.S. 138 (1971).

The question in this case is the extent to which a state agency, such as the MWRA, may compel private sector contractors to execute a specific collective bargaining agreement under Section 8(f) and (e) of the National Labor Relations Act as a condition of being awarded work on a public works project. It must be noted that this is not a case where the state agency

determined to do business only with union contractors, although such a decision clearly would be unlawful. Here the state agency has excluded *all* private sector contractors from the Boston Harbor project, both union and nonunion, except for those contractors willing to agree to terms and conditions of employment dictated by the MWRA.

The legislative history of Section 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f), demonstrates that pre-hire agreements were intended to be entirely voluntary. The House report on the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), Pub. L. No. 86-257, 73 Stat. 519, states

> The Conference adopted the provision of the Senate bill permitting pre-hire agreements in the building and construction industry. [Section 705] Nothing in such provision is intended to...authorize the use of force, coercion, strikes or picketing to compel any person to enter into such pre-hire agreements.

Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, Volume I at 946 (official reprinting 1985).

In addition, during the floor debate Congressman Graham Barden, the floor manager for the Conference Report, cited as controlling the following colloquy between Senators Kennedy and Holland concerning the precursor of Section 705 of the LMRDA:

> Mr. Holland. Was it the intention of the committee that section 604(a) shall require employers to enter into prehire agreements where the union has not been the recognized or certified bargaining agent of the employees involved?
>
> Mr. Kennedy. I shall answer the Senator from Florida as follows — and it is my intention by so answering, to establish the legislative history on this question: It

> was not the intention of the committee to require by section 604(a) the making of prehire agreements, but, rather, to permit them; nor was it the intention of the committee to authorize a labor organization to strike, picket, or otherwise coerce an employer to sign a prehire agreement where the majority status of the union had not been established. The purpose of this section is to permit voluntary prehire agreements. This is because of the inability to conduct representational elections in the construction industry.

Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, Volume II at 1715 (official reprinting 1985).

The voluntary nature of agreements under Section 8(f) and (e) of the National Labor Relations Act is critical to their legality. The legislative history of these provisions makes clear that Congress was concerned that employer and employee rights not be subordinated through any force or compulsion. Thus, although Congress intended to allow such agreements, employers were to be free from government or union coercion in determining whether, or under what conditions, to enter into such agreements. Clearly, an employer's decision whether to enter into such an agreement is a matter which Congress "intended to be unregulated." *Golden State Transit Corporation v. City of Los Angeles*, 475 U.S. 608 (1986).

Here, the MWRA has interfered with this unregulated decision by compelling private sector contractors to execute a specific collective bargaining agreement under Section 8(f) and (e) of the National Labor Relations Act as a condition of being awarded work on a public works project. Petitioners suggest that such state compulsion was contemplated by Congress in enacting Sections 8(f) and (e) of the National Labor Relations Act. The legislative history, however, does not support this suggestion. As the Court noted in *Woelke & Romero Framing*

Inc. v. NLRB, et al., 456 U.S. 645, 663-664 (1982), the voluntary aspect of these statutory provisions are guaranteed by other provisions of the National Labor Relations Act. Most of these protections simply are not available when a state agency such as the MWRA is involved. Thus, the integrated regulatory framework envisioned by Congress in legislating Section 8(f) and (e) as part of the National Labor Relations Act is not applicable when an entity like the MWRA is a party to the activity otherwise regulated by the NLRA. Since the statutory safeguards enacted by Congress to limit abuses of Sections 8(f) and (e) of the NLRA are not applicable to the MWRA, there is no reasonable basis for concluding that Congress intended state agencies, such as the MWRA, to enter into agreements under Sections 8(f) and (e) of the National Labor Relations Act.

Section 8(f) of the National Labor Relations Act is a narrow exception to the general rule protecting employee free choice and employer management rights. It is applicable only to an employer "engaged primarily in the building and construction industry" and to agreements meeting very specific qualifications. Petitioners attempt to make much of the statement of the majority below that "the master labor agreement between the Trades Council and Kaiser is a valid labor contract." 935 F.2d at 356. However, when read in context, it is clear that the majority merely was observing that *absent the involvement of the MWRA* the contract otherwise satisfied the requirements of Section 8(f) and (e) of the Act. Since it is the involvement of the MWRA and the negotiation, execution and implementation of the Master Labor Agreement which is at issue in this case, the legitimacy of the contract absent such involvement truly is "irrelevant to the pre-emption issue at hand." 935 F.2d at 357.

The fact that the project agreement between Trades Council and Kaiser in this case otherwise satisfies the requirements of Section 8(f) and (e) of the National Labor Relations Act, does not conclude the matter in this case. Section 8(f) is specifically

limited to employers "engaged primarily in the building and construction industry" and Section 8(e) is limited to employers "in the construction industry." Here, the Massachusetts Water and Resource Authority neither is an employer under the Act, nor is it "engaged primarily in the building and construction industry."

Although Petitioners urge the Court to ignore the fact that the MWRA is explicitly excluded from the National Labor Relations Act, they make no attempt to argue that the MWRA is "primarily engaged in the building and construction industry." The reason for this omission in their briefs is clear, the MWRA is neither "in the construction industry," nor is it "engaged primarily in the building and construction industry." Accordingly, aside from its non-employer status under the NLRA, the MWRA does not meet the threshold requirements for signing a pre-hire agreement.[7]

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[7] Contrary to the arguments of Petitioners and the United States, the legislative history does not support the conclusion that in passing the Construction Industry Amendments in 1959 Congress anticipated government-mandated project agreements. Although the legislative history does contain references to public works projects built under project agreements, there is no showing that these agreements were mandated by the responsible governmental agency. Historically, such project agreements have been negotiated by the responsible private sector contractors without government interference. Thus, the legislative history shows only that Congress anticipated that private contractors on public works projects would be permitted, *not required*, to enter into agreements under Section 8(f) and (e) of the NLRA.

Also, it should be noted that none of the factors considered by Congress in passing the Construction Industry Amendments in 1959 are applicable to the MWRA. Although Petitioners make the contrary argument, even a cursory examination demonstrates otherwise. The two dominant reasons for enacting Section 8(f) of the National Labor Relations Act were (1) to provide predictable labor costs to allow construction contractors to formulate accurate bids, and (2) to provide construction contractors ready access to an available pool of skilled workers.

III. EVEN ASSUMING THE "MARKET PARTICIPANT" DOCTRINE HAS SOME APPLICATION UNDER THE NLRA, PETITIONERS' "MARKET PARTICIPANT" ANALYSIS IS FATALLY FLAWED.

A. The MWRA Is Not A "Market Participant" As That Term Is Commonly Defined.

Even assuming *arguendo* that some aspect of the "market participant" doctrine survived *Gould*, Petitioners' analysis is fatally flawed because the MWRA cannot be considered a "market participant" under any reasonable definition or interpretation of that concept. Any analysis of the "market participant" doctrine must begin with an examination of the relevant market in which the state seeks to participate. In the instant case, the market in question is the market for construction services and the MWRA as a "participant" in this market wishes to control the labor relations of private sector contractors. Unquestionably, this market is heavily regulated by the National Labor Relations Act.

Here, it is undisputed that the MWRA does not intend to employ *any* construction employees. Thus, it cannot fairly be said that the MWRA has any need for "predictable labor costs." The MWRA's only legitimate concern is with predictable *construction* costs, which can be accomplished through the state's competitive bidding procedure. Similarly, the MWRA has no need for a ready supply of labor. Its only legitimate concern is that its contractors are able to staff the project. This can be done in a number of ways without compromising important rights under the National Labor Relations Act. For example, the MWRA could require any successful bidder to demonstrate by objective means the ability to provide sufficient manpower. In the private sector, both union and non-union employers can be expected and required to make such a showing.

Finally, although Congress also was concerned with the relatively short duration of construction projects making traditional representation elections impractical, this factor has no application to the Boston Harbor project, which is expected to last over ten years. In any event, individual contractors on the project remain free to negotiate 8(f) agreements if they deem it to be in their interest.

As is clearly demonstrated by Petitioners' brief, efforts to control third-party labor relations through the negotiation, execution and implementation of project labor agreements, such as that involved herein, implicates numerous provisions of the National Labor Relations Act. Thus, the NLRA controls who may enter into such agreements, regulates the provisions that such agreements may contain, controls the rights of employees to challenge such agreements, and limits the actions which may, or may not, be taken by a union seeking to enter into such agreements.

Petitioners concede, as they must, that the MWRA is not subject to the National Labor Relations Act. As an agency of the Commonwealth of Massachusetts, it is explicitly excluded from the definition of employer in Section 2(2) of the NLRA. Thus, although the "market" in which the MWRA seeks to be a "participant" is heavily regulated by the NLRA, the MWRA itself is not subject to regulation by that statute. This lack of corresponding regulation on both the participant and the market itself destroys the parity which underpins the basic "market participant" assumption, i.e. all parties subject to the same regulation.

The importance of the integrated and all encompassing scheme of regulation under the NLRA is clearly demonstrated by the Court's decision in *Woelke & Romero Framing Inc. v. NLRB, et al.*, 456 U.S. 645 (1982). In concluding that Congress anticipated the "top down" organizing effect on the employer's involved in that case, the Court specifically noted:

> "The "top down" organizing effect of subcontracting clauses sought or obtained in the context of a collective bargaining relationship is limited in a number of ways by other provisions of the National Labor Relations Act."

456 U.S. at 663-664

The Court specifically contrasted the situation in *Woelke & Romero* with that in *Connell Construction Company*[8] where "many of these protections would not have been available to limit the 'top down' organizing effect of the clauses at issue." 456 U.S. at 664 note 16.

Similarly, in the instant case, where the provisions of the National Labor Relations Act are inapplicable to the MWRA, there is no limitation on the "top down organizing effect" that the subcontracting provisions at issue in this case could accomplish. This absence of regulatory oversight on one of the parties in the "market participant" equation forcefully militates against a finding that Petitioners are privileged to enter into the project agreement herein and in the process escape NLRA pre-emption which would otherwise apply.

Moreover, it should be noted that the MWRA is not driven by the same market forces as private sector participants. Specifically, government officials, unlike their private sector counterparts, are uniquely subject to political pressure from Organized Labor and other special interest groups. Because their tenure in office is subject to the shifting views of the electorate, government officials are particularly sensitized to political pressures from such special voter groups. Thus, the economic viability of a particular business judgment may well prove to be of secondary importance to a government official's instinct for self-preservation. By contrast, in the private sector, special interest groups and members of the public at large typically do not have the power to directly influence the job security of corporate decision makers. Rather, private sector decisions as to whether to negotiate, execute and implement a project agreement are more likely to be based upon economic factors and other legitimate business considerations than upon sheer political pressure.

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[8] *Connell Construction Co. v. Plumbers & Steamfitters Union Local No. 100*, 421 U.S. 616 (1975).

Finally, in contrast to private sector employers, the MWRA is spending taxpayer-generated funds. For this reason alone, it should be held to a different standard than its private sector counterparts. Where a state agency, such as the MWRA, decides to exclude certain contractors/employers and employees from public works projects based solely upon legally protected labor relations choices of the contractors' employees, it not only interferes with the regulatory scheme of the NLRA, as discussed above, but it also unreasonably and unfairly precludes taxpayers from participating in a project they are required to fund. Why should employees who exercise their right to remain union-free be excluded by the state from gainful employment on those very projects which they helped to fund, solely because of their exercise of federally-protected rights?

In summary, when it comes to dictating the labor relations decisions of third-party contractors, the MWRA simply is *not* a "market participant" as that term is generally defined. It is neither subject to the same legal regulations as private sector participants, nor is it subject to the same market forces. It also has the power to exclude otherwise qualified taxpayers from participation in state-funded projects solely because of their exercise of federally protected rights. Accordingly, the so-called "market participant" doctrine is totally inapplicable to the instant situation and cannot serve as a defense for avoiding the NLRA and its pre-emption principles.

B. Petitioners' "Market Participant" Argument Is Based Upon An Unsupported Premise.

The second flaw in Petitioners' "market participant" argument is its reliance upon an underlying premise which is not supported by judicial precedent. In order to endorse the "market participant" argument, this Court must first conclude that a private sector property owner, which does not directly employ any construction employees, is nonetheless permitted to enter into agreements protected under Section 8(f) and (e) of Act. Not

only is such an underlying supposition unwarranted, it is directly contrary to the decision of the NLRB General Counsel in *Plumbers Union, Local 246 (Marlin Mechanical, Inc.)*, NLRB, Case No. 32-CE-52 (NLRB-GC January 31, 1989) (original complaint reprinted as Appendix A hereto).

The fundamental premise underpinning Petitioners' entire argument is that a private property owner, which does not itself employ construction employees, is free to enter into collective bargaining agreements under Section 8(f) and (e) of the National Labor Relations Act. However, Petitioners fail to cite any judicial precedent to support such a conclusion. The sole "authority" cited by Petitioners is a 1986 decision of the General Counsel of the NLRB dismissing a challenge to a prehire agreement covering the construction of the Saturn plant in Tennessee. *Morrison-Knudsen*, 13 Advice Mem. Rep. Par.23,061 (NLRB-GC 1986) (reprinted as Appendix F of the Appendix to the *certiorari* petition in No. 91-261 ("BCTC Pet. App."), at 97a-102a).[9]

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[9] An administrative decision of the NLRB General Counsel, unsupported by either NLRB or judicial approval, hardly constitutes compelling or persuasive authority upon which this Court should premise its decision in the instant case. The NLRB General Counsel is a "prosecutorial" official whose administrative decisions not to issue complaints are unreviewable by any court. *NLRB v. United Food & Commercial Workers Union, Local 23, AFL-CIO*, 484 U.S. 112 (1987). As the NLRB held long ago,

> [The General Counsel's] primary function is to investigate charges and prosecute cases before the Board. *The task of making binding interpretations of the meaning of the Act is a judicial function*, vested in the Board Members with ultimate power of review in the courts.

Bens Cadillac Olds, Inc., 96 NLRB 268, 272 (1951), emphasis added; see also *McBride's of Naylor Road*, 229 NLRB 795, 797 n.2 (1977), and *Exxon Company, U.S.A.*, 253 NLRB 213 (1980).

Indeed, any precedential value of an administrative refusal to issue a complaint is refuted by this Court's decision in *Connell Construction Com-*

The failure of the General Counsel to challenge the private sector project agreement in *Morrison-Knudsen, supra*, does not establish that the Saturn agreement was lawful. Furthermore, it should be noted that Morrison-Knudsen was not the owner of the construction site, and it actually employed construction employees at the Saturn site. BCTC Pet. App at 97a.-98a. Moreover, the property owner *was not a party to the project agreement*. BCTC Pet. App at 101a. Accordingly, General Counsel's failure to challenge the Saturn agreement certainly does not serve as a judicial precedent supporting Petitioners' underlying premise that a private property owner, which does not itself employ any construction employees, may enter into collective bargaining agreements under Section 8(f) and (e) of the National Labor Relations Act.

Petitioners' underlying premise was specifically considered by the General Counsel in *Plumbers Union, Local 246 (Marlin Mechanical, Inc.)*, NLRB Case No. 32-CE-52 (NLRB-GC January 31, 1989).[10] Contrary to Petitioners' argument, the

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pany, Inc. v. Plumbers and Steamfitters Local Union 100, et al., 421 U.S. 616, 89 LRRM 2401 (1975). In *Connell*, the Court ruled that Section 8(e) does not protect agreements sought outside a collective bargaining relationship notwithstanding the fact that the General Counsel previously had refused to challenge a similar agreement. See, *Connell Construction Company, Inc. v. Plumbers and Steamfitters Local Union 100, et al.*, 483 F.2d 1154 (5th Cir. 1973).

[10] *Marlin Mechanical* is referenced at note 12 in *Building & Trades Council*, NLRB Case No. 1-CE-71 (NLRB-GC June 25, 1990) (NLRB Division of Advice Memorandum on the Project Agreement) (reprinted as Appendix D at BCTC Pet. App. 83a-88a). Although Petitioner cites this Advice Memorandum in a related argument, noticeably absent from Petitioner's argument is any discussion of the comments of the NLRB General Counsel in Case No. 1-CE-71 concerning the significance of a private sector employer's failure to employ any construction employees. Specifically, the decision states "[t]he General Counsel has authorized 8(e) proceedings where the employer did not hire and did not intend to hire any construction employees." *Id.* at 87, note 12.

General Counsel rejected the identical argument and issued a complaint alleging that a construction industry employer who did not hire and did not intend to hire any construction employees *was prohibited* from entering into a collective bargaining agreement under Section 8(f) and (e) of the NLRA.[11]

Thus, contrary to Petitioners' argument, it would appear that the NLRB General Counsel has previously determined that a private sector employer which does not employ any construction employees may not avail itself of the protection afforded under under Section 8(f) and (e) of the NLRA.[12]

C. Since The NLRA Is Inapplicable To The States, There Is No Basis For Limiting The "Market Participant" Analysis To Construction Industry Project Agreements As Petitioners Contend.

Petitioners have indicated that their analysis would permit only such contracts as are allowed in the private sector. However, Petitioners ignore the practical effect of such a rule. If the MWRA is permitted to do what the Act condones for private employers, and is not permitted to engage in conduct that the Act prohibits to private employers, then the MWRA would be

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[11] This portion of the complaint subsequently was withdrawn by the General Counsel as a result of additional evidence that the Employer did employ an employee who performed work covered by the agreement and who was in fact covered by the agreement. See Appendix B hereto. Thus, neither the Board nor the courts were given the opportunity to consider the NLRB General Counsel's analysis of Section 8(f) and (e) of the NLRA. Nevertheless, *Martin Mechanical* clearly demonstrates that the NRLB General Counsel has specifically rejected Petitioner's underlying premise that a private sector employer similar to the MWRA would be permitted to enter into the agreement at issue in this case.

[12] Although the General Counsel dismissed the charge in Case No. 1-CE-71, it must be noted that his decision specifically stated "[t]here is no contention that the [Kaiser] acted as an agent of MWRA rather than as a principal when it signed the Agreement." *Building & Trades Council*, *supra* note 3. As we now know, it is undisputed that Kaiser acted as an agent of MWRA when it negotiated and signed the instant Project Agreement.

de facto subject to the National Labor Relations Act. This would be contrary to the explicit exclusion of "any State or political subdivision thereof" from the definition of employer in Section 2(2) of NLRA. Petitioners make no attempt to address the inherent contradictions posed by their analysis.

Moreover, the detailed analysis of the motivations and actions of the MWRA set forth in Petitioners' brief demonstrates the critical flaw in their analysis. In excluding the states from coverage under the NLRA, it was the intention of Congress to preclude such detailed scrutiny of state actions and motives. If the analysis advocated by Petitioners were to be adopted, every pre-emption case involving state action would trigger a comparison of the motivations of the state with similar motivations of private sector employers. The ultimate litmus test of pre-emption in such cases would be measured by the rights and obligations of private sector employers. Clearly, this was not the result which Congress intended when it excluded the states from coverage under the NLRA.

The purposeful design of the NLRA was to exclude state agencies such as the MWRA and to further insure that their actions do not interfere with the Act's "integrated scheme of regulation." This is true whether that interference occurs through the exercise of state regulatory power or state spending power. If Petitioners wish to subject state action to scrutiny under the National Labor Relations Act, or to allow state action to interfere with or contradict its regulatory framework, their petition should be directed to Congress, not to this Court.

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be sustained.

Respectfully submitted.

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

Case 32-CE-52

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE-FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, LOCAL UNION No. 246

and

MARLIN MECHANICAL, INC.

and

FRU-CON CONSTRUCTION
Party to the Contract

and

BUD BAILEY CONSTRUCTION
Party to the Contracts

COMPLAINT AND NOTICE OF HEARING

It having been charged by Marlin Mechanical Inc., herein called Marlin, that United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local Union No. 246, herein called Respondent, has engaged in, and is engaging in, certain unfair labor practices effecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et. seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1.

The charge was filed by Marlin on October 26, 1987, and a copy thereof was served on Respondent by certified mail on the same date.

2.

(a) At all times material herein, Marlin has been a contractor with an office and place of business located in Visalia, California, where it is engaged in the business of installing heating, cooling and sprinkler systems.

(b) At all times material herein, Bud Bailey Construction (herein called Bailey) has been a contractor with an office and place of business located in Salt Lake City, Utah, where it is engaged in business as a construction contractor.

(c) At all times material herein, FRU-CON Construction (herein called FRU-CON), has been a contractor with a principal office and place of business located in Ballwin, Missouri, where it is engaged in business as a general construction contractor.

(d) During the past twelve months, FRU-CON, in the course and conduct of its business operations, performed services valued in excess of $50,000 directly for customers located outside the State of Missouri.

(d) During the past twelve months, Bailey, in the course and conduct of its business operations, performed services valued in excess of $50,000 directly for customers located outside the State of Utah.

3.

(a) FRU-CON and Bailey are each now, and have been at all times material herein, employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

(b) Marlin is now, and has been at all times material herein, a person within the meaning of Section 2(1) of the Act.

4.

(a) Respondent is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

(b) At all times material herein, Bob Ward occupied the position of Respondent's Business Agent and has been, and is now, an agent of Respondent within the meaning of Section 2(13) of the Act.

5.

(a) On or about April 6, 1987, FRU-CON entered into an agreement with Respondent and other building trade unions (herein called the Project Agreement), to be effective April 14, 1987, relating to the contracting and subcontracting of on-site construction work at a new snack plant at Visalia, California (herein called the Project).

(b) Article II, paragraph D of the Project Agreement (herein called the Union Signatory Clause) states:

> D. In the event the Employer subcontracts out any work covered by this Agreement such subcontractor shall become signatory to this Agreement for such work. It being understood that the subcontractors presently employed by the Employer are not subject to this Agreement but may, by executing this Agreement, become party to and beneficiary of this Agreement. Attached hereto and marked Exhibit A and incorporated by reference herein is the List of Subcontractors excluded from this Agreement.
>
> It is understood that there a may be instances when suitable, competitive union subcontractors may not be available for certain subcontracts. In such instances,

the Employer will notify the Union 10 days prior to the bid, and the Union will endeavor to locate suitable, competitive union subcontractors to bid for the work. If the Employer and the Union are unable to locate such suitable subcontractors, it is understood and agreed that the Employer will be relieved of the requirements of this paragraph D for such subcontracts.

6.

Marlin did not become aware of the conduct alleged in paragraphs 5(a) and (b) above until a date after April 26, 1987.

7.

In or about June, 1987, FRU-CON solicited subcontracting bids for an interior phase of the Project (herein called the Interior Work).

8.

(a) In or about June, 1987, Bailey submitted a bid (herein called the Bid) for the Interior Work, which Bid included a list of Bailey's proposed subcontractors, including Marlin.

(b) Sometime in or about June, 1987, Bailey was awarded the Interior Work by FRU-CON.

9.

In or about the last week of June, 1987, Respondent, by its Business Agent Bob Ward, informed Bailey that Marlin was not signatory to any collective bargaining agreement with Respondent.

10.

On or about July 17, 1987, Bailey, by its Project Manager Mike Evans, advised Respondent by letter of Bailey's intent to award certain mechanical work encompassed in the Bid to Marlin.

11.

In or about July, 1987, Respondent, by its Business Agent Bob Ward, notified FRU-CON that Marlin was not signatory to any collective bargaining agreement with Respondent, and would have difficulty becoming signatory to any collective bargaining agreement because of prior labor disputes with Respondent.

12.

On or about July 22, 1987, Bailey, by its Project Manager Mike Evans, advised Marlin that Bailey would not sign a subcontract for work on the Project with Marlin until Marlin obtained the approval of Respondent.

13.

On or about July 27, 1987, Respondent, by its Business Agent Bob Ward, advised Marlin that Respondent would continue to oppose Marlin becoming signatory to any subcontract involving work on the Project unless Marlin became signatory to an area-wide, full-term collective bargaining agreement with Respondent, and not simply the Project Agreement.

14.

On or about August 10, 1987, Bailey, by its Project Manager Mike Evans, informed Marlin that Bailey would not enter into a subcontract with Marlin for work on the Project.

15.

At no time material herein was a collective bargaining relationship in existence or envisioned between Respondent or the other labor organizations party to the Project Agreement, and FRU-CON or Bailey, in that neither FRU-CON nor Bailey then employed or intended to employ, or ever employed, any employees covered by the Project Agreement.

16.

The acts and conduct of Respondent described in paragraphs 9, 11, and 13 above constitute a reaffirmation, or a "re-entering into," of the provisions of Union Signatory Clause.

17.

(a) The acts and conduct of Respondent and Bailey as described above in paragraphs 12, 13, and 14 constitute an "entering into" of an agreement relating to the subcontracting of work to be done at a construction site.

(b) Sometime in or about June, 1987, Respondent and Bailey entered into or adopted the terms of the Project Agreement.

18.

By the acts and conduct described above in paragraphs 5, 9, 11, 12, 13, 16 and 17, Respondent has entered into, maintained, and/or given effect to agreements whereby FRU-CON and/or Bailey have ceased and refrained, and have agreed to cease and refrain, from doing business with other employers or persons, including Marlin.

19.

The acts of Respondent described above in paragraphs 5, 9, 11, 12, 13, 16, 17 and 18, and each of said acts, constitute unfair labor practices affecting commerce within the meaning of Section 8(e) and Section 2(6) and (7) of the Act.

WHEREFORE, as part of the remedy for the unfair labor practices alleged above, the General Counsel seeks an Order requiring that Respondent, *inter alia*, not enter into, maintain, give effect to, or enforce the Union Signatory Clause or other agreement alleged here, to the extent the aforesaid agreements violate Sectin 8(e) of the National Labor Relations Act.

PLEASE TAKE NOTICE that on the 21st day of March, 1989, at 9:00 a.m. Pacific Standard Time, in Fresno, California, at a place to be designated hereafter, and continuing on consecutive days thereafter until completed, a hearing will be conducted before a duly designated Administrative Law Judge of the Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB-4668, Statement of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

YOU ARE FURTHER NOTIFIED that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, Respondent shall file with the undersigned, acting in this matter as agent of the Board, an original and four (4) copies of an Answer to said Complaint within fourteen (14) days from today and that unless it does so, all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of its Answer, Respondent shall serve a copy thereof on each of the other parties.

DATED AT Oakland, California this 31st day of January, 1989.

/s/James S. Scott
JAMES S. SCOTT, Regional Director
National Labor Relations Board
Region 32
2201 Broadway, 2nd Floor
P.O. Box 12983
Oakland, California 94604

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

Case 32-CE-52

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE-FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, LOCAL UNION NO. 246

and

MARLIN MECHANICAL, INC.

and

FRU-CON CONSTRUCTION
Party to the Contract

and

BUD BAILEY CONSTRUCTION
Party to the Contracts

ORDER WITHDRAWING PORTIONS OF COMPLAINT AND DISMISSING PORTION OF UNFAIR LABOR PRACTICE CHARGE

On January 31, 1989 Complaint issued in the above case, alleging, inter alia, that United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local Union No. 246, herein called Respondent, and Bud Bailey Construction, herein called Bailey, entered into an agreement relating to the sub-contracting of work to be done at FRU-CON Construction's snack plant construction project at Visalia, California, and that said conduct on Respondent's part violated Section 8(e) of the National Labor Relations Act, as amended, herein called the Act.

Subsequent to the issuance of the Complaint, as a result of additional evidence and information obtained during the course of pre-trial preparation, it has been determined that the alleged Section 8(e) agreement between Respondent and Bailey was entered into in the context of the type of collective bargaining relationship envisioned under *Connel Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (197) and *Woelke & Romero Framing Co. v. N.L.R.B.*, 456 U.S. 645 (1982), in that Bailey, during the life of that agreement, did employ an employee who performed work covered by that agreement and who was in fact covered under that agreement. See also *Morrison-Knudsen Co.*, Cases 26-CE-8 et al., Advice Memorandum dated March 27, 1986. Accordingly, as Respondent's conduct concerning its subcontracting agreement with Bailey can no longer be viewed as unlawful.

IT IS HEREBY ORDERED, pursuant to the provisions of Section 102.18 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, that the references to Bailey in paragraph 15; paragraph 17; and the references to paragraphs 9, 12, and 17 in paragraphs 18 and 19 in the Complaint issued in Case 32-CE-52 be, and they hereby are, withdrawn.

IT IS HEREBY FURTHER ORDERED that to the extent that the charge filed in Case 32-CE-52 alleges that Respondent has violated and is violating Section 8(e) of the Act by reason of it having "entered into" an agreement with Bailey regarding the subcontracting of work to be done at the FRU-CON Construction Visalia, California snack plant project, all such allegations be, and they hereby are dismissed. The remaining allegations in Case 32-CE-52, as well as the remaining allegations in the Complaint issued therein, are not being dismissed.

but remain the subject of further proceedings.[1]

DATED AT Oakland, California this 16th day of October, 1990.

/s/James S. Scott
JAMES S. SCOTT, Regional Director
National Labor Relations Board
Region 32
2201 Broadway, 2nd Floor
P.O. Box 12983
Oakland, California 94604

[1] Pursuant to the National Labor Relations Board's Rules and Regulations, Series 8, as amended, a review of this action may be obtained by filing an appeal with the General Counsel, addressed to the Office of Appeals, National Labor Relations Board, Washington, D.C. 20570, with a copy to the Regional Director. This appeal must contain a complete statement setting for the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D.C. by close of business on October 30, 1990. Upon good cause shown, however, the General Counsel may grant special permission for a longer period of time within which to file. Any request for an extension of time must be submitted to the Office of Appeals in Washington, D.C., and a copy of any such request should be submitted to the Regional Director.

If you file an appeal, please complete the notice forms I have enclosed with this Order, and send one copy of the form to each of the other parties involved in this case. Their names and addresses are listed on the attached Affidavit of Service. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel, and a copy of the appeal with the Regional Director within the time stated above.

(22) (21)

FILED
SEP 8 1992
OFFICE OF THE CLERK

Nos. 91-261 and 91-274

In The
Supreme Court of the United States
October Term, 1992

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT,
Petitioners,
v.
ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.,
Respondents.

MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS,
Petitioners,
v.
ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.,
Respondents.

On Writ of Certiorari To The
United States Court of Appeals for the First Circuit

BRIEF OF *AMICUS CURIAE* UTILITY CONTRACTORS ASSOCIATION OF NEW ENGLAND, INC. IN SUPPORT OF RESPONDENTS

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Nos. 91-261 and 91-274

In The
Supreme Court of the United States
October Term, 1992

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT,

Petitioners,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.,

Respondents.

MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS,

Petitioners,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.,

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On Writ of Certiorari To The
United States Court of Appeals for the First Circuit

BRIEF OF *AMICUS CURIAE* UTILITY CONTRACTORS ASSOCIATION OF NEW ENGLAND, INC. IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS

The Utility Contractors Association of New England, Inc. (UCANE) is a non-profit corporation with a principal place of business in Quincy, Massachusetts. UCANE is a trade association; its members include union and non-union contractors, materialmen, suppliers and others who are engaged in public construction in

Massachusetts and other New England States. UCANE represents its members in dealings with governments and in litigation challenging governmental actions that illegally interfere with its members' rights to do business.

UCANE members have been awarded construction contracts for the Massachusetts Water Resources Authority (MWRA) valued in the tens of millions of dollars, including contracts for work on the Boston Harbor Cleanup Project. Its members have been awarded and have successfully completed hundreds of other contracts for the Commonwealth of Massachusetts valued at many hundreds of millions of dollars. In the future, its members intend to bid on other contracts advertised by the Commonwealth and MWRA.

In March 1990, UCANE filed an unfair labor practice charge with the National Labor Relations Board (NLRB) challenging the legality of the Project Labor Agreement (the "Agreement") between MWRA's representative, Kaiser Engineers, Inc. (Kaiser) and the Building and Construction Trades Council (BCTC). The NLRB's Regional Director for Region I declined to issue a complaint, concluding that the Agreement was legal. *Building & Construction Trades Council (Kaiser Engineers, Inc.)*, Case 1-CE-71, GC Advice Memo (June 25, 1990) (Pet. App. 88a-93a).[1]

UCANE is the plaintiff in a civil action in Massachusetts Superior Court, *UCANE v. Commissioner of the Massachusetts Dept. of Public Works*, ("DPW") Mass. Super. Ct. C.A. No. 90-3035, challenging a union-only requirement for the five-billion-dollar Central Artery-Third Harbor Tunnel Project that is similar to the MWRA's Agreement and Bid Specification 13.1. UCANE's suit primarily challenges the bid specification as a violation of

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[1]The NLRB examined the matter on the assumption that Kaiser was not the agent of MWRA but was an independent "employer" within the meaning of the National Labor Relations Act (NLRA), 29 U.S.C. §151 *et seq.* Pet. in BCTC v. ABC, 84a n.3. As shown below at pp. 22-25, this assumption is false. The NLRB Regional Director specifically declined to decide any state law issues on the merits. *Id.* at 87a n. 13. UCANE chose not to appeal.

Massachusetts law. The Massachusetts Appeals Court dismissed as moot UCANE's appeal from the denial of injunctive relief because the DPW conceded that it was bound by the First Circuit's decision in the instant case; DPW promised not to enforce its union-only requirement as long as the First Circuit's decision remains law. *UCANE v. DPW*, 29 Mass. App. Ct. 726, 565 N.E.2d 459 (1991). The Massachusetts Superior Court has delayed further action on UCANE's suit pending the outcome of the instant suit. Order for Modification of Tracking Schedule, Aug. 13, 1992. Thus, this case may decide the rights of UCANE and many of its members. All parties have consented to the filing of this amicus brief.

STATEMENT OF THE CASE

UCANE accepts and adopts the Respondents' Statement of the Case.

SUMMARY OF ARGUMENT

MWRA's Bid Specification 13.1 would force all general contractors and sub-contractors on the Boston Harbor Clean-up Project to execute the Agreement; that, in turn, would require them to be bound by the BCTC's collective bargaining agreements. MWRA's requirement would have a devastating impact on construction contractors in Massachusetts. In practical effect, MWRA's scheme would seriously disturb the balance between labor and management that Congress struck in the NLRA. The multi-billion Harbor Project is so large that the MWRA's scheme will disrupt the entire Massachusetts construction industry. Moreover, upholding MWRA's strategy would set a precedent for excluding from all public sector contracts all contractors who choose to negotiate their own collective bargaining agreements and all non-union contractors.

MWRA's forced unionization strategy is not saved from preemption by the theory that it is a legitimate response to state procurement constraints or to local economic needs. To the contrary, MWRA is acting well beyond its state law authority and contrary to Massachusetts procurement laws.

Considering the pervasive state regulatory scheme in which MWRA operates and from which this case arose, MWRA's claim that it is a mere "proprietor" operating pursuant to state law is patently false. Massachusetts has created a web of state laws governing public works contracts in meticulous detail. These laws inextricably intertwine proprietary and regulatory effects and purposes. Under state law, MWRA's bid specification is a regulation. In this state law context, the only rule of federal preemption that safeguards Congress's intent to bar state regulation of certain economic weapons is the rule implicit in this Court's precedents: state action is preempted when it directly and substantially interferes with the protected activities, even if the state claims to be acting as a proprietor. Moreover, state law prevents MWRA from using Kaiser Engineers as its agent and then contending that Kaiser's participation exempts the scheme under NLRA §8(e) and (f) from preemption.

Accordingly, the First Circuit correctly decided that the NLRA preempts MWRA's scheme.

ARGUMENT

I. MWRA'S ACTION, IF UPHELD, WOULD HAVE A DEVASTATING REGULATORY IMPACT ON CONTRACTORS.

A. *MWRA's Action Will Adversely Affect Construction Contractors.*

MWRA's requirement that successful bidders execute its Agreement interferes with the free collective bargaining guaranteed by the NLRA and disturbs the balance of economic power between labor and management that Congress has struck. This violation of a federally protected right, *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986), 493 U.S. 103 (1989), would have several ruinous effects on contractors such as the members of UCANE, effects that would extend far beyond the Harbor Project.

Most obviously, non-union contractors would be hurt. They have exercised their federal right not to sign pre-hire agreements. MWRA would compel them to choose between their right to negotiate with their employees the terms and conditions of employment

and their right to a contract to which they are otherwise entitled.

The injury extends to union contractors as well. Contractors who have previously signed collective bargaining agreements with unions governing the geographic area regulated by the Agreement would be forced by MWRA to either sign the Agreement (which would then supersede their own agreements) or forfeit their contract awards. MWRA would effectively usurp the union contractors' right to negotiate the terms and conditions of their collective bargaining agreements.

The Agreement and Bid Specification would tilt the federally defined balance between labor and management in collective bargaining in the private sector strongly in favor of unions. MWRA will spend more than six billion dollars on the Harbor Project. The state will spend another five billion dollars on the Central Artery Project which has a similar union-only project labor agreement that will stand or fall with MWRA's Agreement. *UCANE v. Commissioner of DPW*. These two "mega-projects" will provide a large proportion of the construction industry jobs in Massachusetts for the next decade.

Although both agreements ban strikes on the two projects in return for the union-only strictures, they do not prevent signatory unions from striking private sector employers on private projects. Indeed, the agreements would encourage such strikes. MWRA's Agreement incorporates by reference two dozen collective bargaining agreements between unions and multi-employer organizations. All increases in wages and other benefits the unions win in future collective bargaining agreements are automatically incorporated by reference as well. The Harbor and Artery Agreements guarantees the unions thousands of jobs for their members, jobs they can use as a base to finance strikes against private contractors. In such strikes BCTC's unions could assess their non-striking members employed on the two mega-projects to subsidize benefits for the strikers. This would increase the likelihood and length of strikes. It would require contractors who are compelled to sign the Agreement to finance strikes against themselves on the private sector projects. This disturbs the labor-management balance struck by Congress in

the NLRA. *Lodge 76, International Association of Machinists v. Wis. Employment Relations Commission*, 427 U.S. 132, 146 (1976). It would increase the probability of costly wage and benefit concessions and the chance of onerous work rules being included in future private collective bargaining agreements negotiated during the ten-year life of the project.

Thus, each time the unions use their increased clout against local employer trade associations to get increased wages and other improvements in the terms of employment, these increases will be extended automatically to their members working on the Harbor Project. The result would be an open-ended feedback cycle tipping the balance further and further toward labor and inflating the costs of labor on both private and public works projects.[2] Consequently, the Agreement fails to achieve the purpose of the typical private "pre-hire" agreement of enabling each contractor to "know his labor costs before making the estimate on which his bid will be based."[3] U.S. Br. 11 *quoting NLRB v. International Assn. of Bridge & Iron Workers*, 434 U.S. 335, 348 (1978). Pet. Br. 10, *quoting* H.R. Rep. No. 741, 86th Cong., 1st Sess. 19 (1959).

B. *Upholding MWRA's Action Would Permit Excluding Non-Union Contractors from All Public Works Contracts.*

There is no distinction under the NLRA between large and small construction projects. The Petitioners suggest that MWRA

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[2]Furthermore, Kaiser, the alleged "employer" that signed the Agreement will pay none of these increased costs except perhaps in those rare instances when Kaiser briefly steps beyond its management role and hires a few craft workers to deal with temporary emergencies.

[3]Construction industry labor agreements typically run only one to three years (as illustrated by the agreements incorporated into the Project Labor Agreement as Schedules A and B). As each contract expires, each union will then automatically get the raises that it has negotiated in other private contracts. There is no way that MWRA or anyone else can predict how high the feedback cycle it has created will drive up wages. Hence, there is no way that it can predict, let alone cap, labor costs over the life of the Harbor Project.

needs extraordinary flexibility to manage the extraordinary complexity of the multi-billion-dollar Harbor Project. Pet. Br. 4-525-26. But great projects, like great cases, can make bad law. *See Northern Securities Co. v. U.S.*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting). If MWRA can condition public works contracts on sacrificing the right to bargain collectively, then every town, school board and water board in the country can demand the same sacrifice whenever it pleases. This action directly addresses a six-billion-dollar project but it may set a precedent for every pot-hole filling and sewer repair in the nation.[4]

A decision reversing the court below would set a precedent for politicizing the collective bargaining process. Congress intended to leave that process "unregulated" and "controlled by the free play of economic forces." *Machinists*, 427 U.S. at 144. If each agency could impose union-only requirements, then collective bargaining, which Congress intended to be an economic contest between private parties, would be replaced by a political contest between public officials. Moreover, the balance of political power could tip against unions elsewhere. If a state can impose a union-only requirement, as MWRA has done, then another state can impose a no-union rule. No matter what the outcome, such maneuvers substitute political patronage for the "free play of economic forces"

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[4]Supposing that a legal distinction could be drawn between the Harbor Project and smaller projects it would cut against applying the limited exemption from preemption under NLRA §8(f) to MWRA's scheme. As Petitioners and the United States concede, §8(f) was intended to address the special needs of the construction industry arising from the brevity of employer-employee relations on construction projects. Petitioners' Br. at 9-10; U.S. Br. at 11, 28. But the Harbor Project is far from brief: it will last at least 10 years and many of the major contracts awarded will run for at least several years; some will run for the life of the Project. Thus, there is sufficient time to follow the NLRB's usual, non-construction industry rules for certifying a union as the employees' collective bargaining agent.

that Congress has mandated in the NLRA.[5]

II. MWRA'S ACTION IS CONTRARY TO STATE LAW AND SO CANNOT BE JUSTIFIED AS ADVANCING SPECIAL STATE INTERESTS.

Petitioners' argument, Pet. Br. 35, that MWRA's actions can be "defended as a legitimate response to state procurement constraints or to local economic needs," *Wis. Dept. of Industry v. Gould, Inc.* 475 U.S. 282, 291 (1986), is wrong. MWRA has stretched its state authority far beyond the breaking point. It has no authority to authorize, ratify, or incorporate the Agreement into its bid specifications. Rather than responding to state procurement constraints it is violating them.

A. *This Case Arises in the Context of A Pervasive State Regulatory Scheme Governing Contracts for Public Works Projects that Is the Exclusive Source of MWRA's Authority to Set Bidding Procedures.*

Although this case so far has been fought almost entirely on issues of federal law, it arises in the context of a pervasive state regulatory scheme. Massachusetts has the distinction of having the most regulated public construction contracting processes in the country. C. NOBLE & J. MYERS, MASSACHUSETTS CONSTRUCTION LAW 1990 74 (1990). Its statutes override the ordinary rules of private contract law regarding public bidding and public works contracts. *Id.* This state law background undercuts MWRA's claim that this is a states' rights case in which a state "proprietor" is being unfairly denied the right to do what all other proprietors can do. A survey of the state regulatory scheme and the ways in

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[5]*Compare. Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495-96 (O'Connor, J.) (1989) (in racial context "the concern that a political majority will more easily act to the disadvantage of a minority . . . would seem to militate for, not against, the application of heightened judicial scrutiny"), 523-24 (Scalia, J., concurring). Although there is no racial aspect to this action, the MWRA's compelling employees to join unions is state action which may intrude on their First Amendment freedom of association.

which MWRA has distorted it supports the First Circuit's decision.

As an instrumentality of the Commonwealth, MWRA obtains its authority from its enabling act, 1984 Mass. Acts No. 372, *codified at* M.G.L. c. 92 App., §1-1 *et seq.* (hereinafter "Act 372" or "Enabling Act"). That act defines MWRA as "a public agency" subject (with certain limited exceptions) to the pervasive regulatory scheme governing public contracts. *Id.* at §8(g), 7(g). MWRA asserts that these laws empower it to issue its Bidding Specification 13.1 that commands all general contractors and sub-contractors to execute the Agreement as a condition of obtaining contracts to which they would otherwise be entitled under state law. However, as discussed below, Massachusetts law does not permit MWRA to impose the Project Labor Agreement through its bid specifications.

B. *MWRA is Violating the Massachusetts Constitution.*

Article XXX of the Declaration of Rights of the Massachusetts Constitution provides that "the Executive shall never exercise the legislative and judicial powers or either of them . . . to the end it may be a government of laws and not of men." When an administrative agency acts beyond the scope of its delegated authority its conduct is unlawful. *New England Medical Center, Inc. v. Rate Setting Commission*, 384 Mass. 46, 423 N.E.2d 786 (1981); *Bureau of Old Age Assistance of Natick v. Commission of Public Welfare*, 326 Mass. 121, 93 N.E.2d 267 (1950).

The Massachusetts Supreme Judicial Court has strictly construed the Commonwealth's public bidding laws, requiring administrative agencies to comply with all details of the comprehensive scheme. *Modern Continental Construction Co., Inc. v. City of Lowell*, 391 Mass. 829, 840, 465 N.E.2d 1173 (1984); *Phipps Products Corp. v. Mass. Bay Transp. Authority*, 387 Mass. 687, 443 N.E.2d 115 (1982); *Datatrol, Inc. v. State Purchasing Agent*, 379 Mass. 679, 695 400 N.E.2d 1218 (1980); *Interstate Engineering Corp. v. City of Fitchburg*, 367 Mass. 751, 757, 329 N.E.2d 128 (1975); *Gifford v. Commissioner of Public Health*, 328 Mass. 608, 616, 105 N.E.2d 476 (1952); *Commonwealth v. Gill*, 5 Mass. App. Ct. 337, 363 N.E.2d 267 (1977). Neither this statutory scheme nor MWRA's enabling act authorizes MWRA to require

contractors to execute a collective bargaining agreement as a condition of being awarded a public contract. *See Modern Continental Construction Co., Inc. v. Massachusetts Port Authority*, 369 Mass. 825, 829-30 343 N.E.2d 362 (1976).

C. *MWRA is Violating the Massachusetts Fair Competitive Bidding Laws.*

1. *MWRA Lacks Authority to Reject the Lowest Responsible and Eligible Bidders Who Decline to Execute the Agreement.*

Advertising and awarding of public construction projects are governed by two statutes. One covers the construction of highways, bridges, tunnels and similar structures. M.G.L. c. 30, §39M. The other governs construction or renovation of public buildings, M.G.L. c. 149, §44A *et seq.* Because the Harbor Project requires the construction of both public works and public buildings, both statutes apply. Both statutes share the overriding purpose of opening the competitive bidding process to all contractors to award the contract to the lowest responsible and eligible bidder to construct public projects. *Interstate Engineering Corp. v. Fitchburg*, 367 Mass. 751, 757-58 (1975). M.G.L. c. 30, §39M, c. 149, §44A. A "responsible" bidder is one "possessing the skill, ability and integrity necessary for the faithful performance of the work" and who "shall certify that he is able to furnish labor that can work in harmony with all other elements of labor employed . . . in the work" and who meets certain other technical requirements. M.G.L. c. 30, §39M(c) and c. 149, §44A. Bidders must submit a bond promising faithful performance of the agreements contained in the bid, including compliance with all bid specifications. Again, neither statute distinguishes between union and non-union contractors nor refers to collective bargaining agreements.

MWRA has attempted to use the Massachusetts Competitive Bidding Law as its legal basis for imposing the Agreement on all Harbor Project contractors. Pet. Br. 8. Petitioners concede that without Bid Specification 13.1, the Agreement would bind only Kaiser and not the hundreds of contractors who actually will do the work. *Id.* at 7-8; U.S. Br. 10. Under MWRA's Specification 13.1,

failure to execute the Agreement would be a breach of performance, and MWRA could claim all or part of the bond.

However, MWRA's scheme violates the statutes. Automatically rejecting the lowest responsible and eligible bidders if they decline to execute the Agreement as a condition of working for MWRA violates the competitive bidding laws As the Massachusetts Supreme Judicial Court said in *Modern Continental Construction Co., Inc.*, 369 Mass. at 829:

> [U]nionism is not a statutory requirement to be deemed "responsible"' or "eligible" as those terms are used in M.G.L. c. 30, §39M and the statute itself would bar automatic exclusion of any bidder on the sole ground that the bidder employs nonunion workers.

The court emphasized that an agency may not restrict bidding to unionized firms and that coercion of public officials to stop an award of a contract to a non-union bidder would be against public policy. *Id.* at 830. Yet MWRA is doing exactly what *Modern Continental* prohibits: requiring that the lowest qualified bidder unionize as a condition of receiving the contract.

While an awarding agency may impose limited requirements beyond those set forth in the bidding statutes it may not impose illegal or unreasonable requirements, *See Builders Realty Corp. of Mass. v. Newton*, 348 Mass. 64, 67, 201 N.E.2d 825 (1964). Contracts that are inconsistent with the controlling statute or go beyond its scope are void. *Phipps Products Corp. v. MBTA*, 387 Mass. at 692.

The legislature designed the statutory bidding procedures of M.G.L. c. 149 §44A *et seq.*, to substantially reduce the discretion of the awarding agencies and to accomplish

> two fundamental, complementary legislative objectives[:] . . . First, the statute enables the public contracting authority to obtain the lowest price for its work that competition among responsible contractors can secure. . . . Second, the statute establishes an honest and open procedure for competition for public contracts and, in so doing, places all general contractors and subbidders on an equal footing in the competition to gain

> the contract. The statutory procedure facilitates the elimination of favoritism and corruption as factors in the awarding of public contracts and emphasizes the part which efficient, low-cost operation should play in winning public contracts.

Interstate Engineering, 367 Mass at 757-58. *Accord, James J. Welch & Co. v. Dep. Comm'r of Capital Planning and Operations*, 387 Mass. 662, 666, 443 N.E.2d 382 (1982); *Phipps Products Corp. v. MBTA*, 387 Mass. at 691-92; *Datatrol, Inc. v. State Purchasing Agent*, 379 Mass. 679, 696-97; *Morse v. Boston*, 253 Mass. 247, 252, 148 N.E. 813 (1925).

While the first objective is one that would be shared by any private proprietor, the state's second objective -- fostering equal opportunity in the construction industry -- is peculiarly governmental. It is a kind of affirmative action program, opening the bidding process to all firms, union and non-union alike. The possible advantage to any one private owner of so opening the market would not be worth the risk of dealing with an unknown and inexperienced firm when a known and experienced firm is bidding to do the work for nearly the same price. The state, however, has chosen to adopt opening the market as a public policy. Given this special state goal, state agencies, such as MWRA, are unlike private proprietors.

An agency's failure to follow the statutory bidding requirements voids the contract, even if the violation does not harm the public agency, *Phipps Products v. MBTA*, 387 Mass. at 691: *Bowditch v. Superintendent of Streets of Boston*, 168 Mass. 239, 243-44 (1897); or reduces the costs to the public, *Interstate Engineering*, 367 Mass 751; *Grande & Son, Inc. v. School Housing Comm. of N. Reading*, 334 Mass. 252, 258, 135 N.E.2d 6 (1956); *East Side Constr. Co. v. Adams*, 329 Mass. 347, 351, 108 N.E.2d 659 (1952); *Gifford v. Comm'r of Pub. Health*, 328 Mass. at 616; or did not involve bad faith or corruption, *id.* at 617.

MWRA's rejection of bidders who decline to execute the Agreement cannot be justified by the provision of M.G.L. c. 30, §39M(a) that permits the awarding agency to "reject any and all bids, if it is in the public interest so to do." The Massachusetts

Appeals Court has interpreted this provision with appropriate narrowness:

> Except where all bids are rejected, this statute requires the awarding of the contract to the lowest responsible and eligible bidder determined after competitive bids have been filed pursuant to a publicized invitation. The same is true of contracts governed by G.L. c. 149, §§44A-44L. Although it might appear that the word "any" . . . would allow rejection of the low bid so as to result in the awarding of the contract to a person not the lowest responsible and eligible bidder, a long line of cases has determined that contracts subject to those provisions cannot properly be awarded to one other than the lowest responsible and eligible bidder.

Commonwealth v. Gill, 5 Mass. App. Ct. at 339-40.

2. *The "Harmony Clause" Does Not Empower MWRA to Impose the Agreement on Contractors.*

Both M.G.L. c. 30, §39M(c) and c. 149, §44F(2)(I), require bidders to certify that their workers can "work in harmony with all other elements of labor employed . . . in the work." As the Supreme Judicial Court noted in *Modern Continental*, 369 Mass. at 830, "The 'harmony' clause . . . clearly contemplates a situation in which the union and non-union workers work in some type of proximity to one another." By enacting this provision, the Legislature chose, consistent with the NLRA, not to require public works contractors to sign a collective bargaining agreement to obtain a state contract. Rather, the Legislature contemplated that some contractors will be unionized and others will not be. Thus, MWRA cannot persuasively argue that the harmony clause should be stood on its head to authorize it to negotiate a collective bargaining agreement for private sector employees and force unwilling subcontractors to sign.

Moreover, the harmony clause is a request for certification, not an invitation to extortion. A bidder satisfies it by submitting the statutory certification that his workers are willing to work in harmony with others. A qualified lowest bidder's right to receive the contract should not be frustrated by threats from third parties

to disrupt the project unless they are given exclusive arrangements.[6]

3. *MWRA is Violating the Pre-Qualification Provisions of the Fair Competitive Bidding Laws.*

Under the Pre-Qualification provisions, M.G.L. c. 30, §39M(c), c. 29, §8B, c. 149, §44D, of the Fair Competitive Bidding Laws, contractors wishing to obtain state construction work worth more than $50,000, must "pre-qualify" under M.G.L. c. 29, §8B. This requires submitting corporate and financial information and data concerning its experience. Neither the statute nor applicable regulations say anything about willingness to execute a collective bargaining agreement as a condition of the award of a contract. A general bidder who submits a valid certificate of eligibility issued pursuant to these provisions is legally presumed qualified. Bidder pre-qualification "is a cornerstone of the competitive bidding statute." *Modern Continental Construction Co., Inc. v. Lowell*, 391 Mass. at 840. Nothing in the law suggests that unwillingness to execute a collective bargaining agreement is a permissible ground for deciding that a contractor is unqualified. *See id.* The only relevant factor is the contractor's ability to do the work.

D. *MWRA is Violating the Massachusetts Filed Sub-Bid Law.*

The Massachusetts public contracting system is distinctly

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[6]Contrary to Petitioners suggestions, Pet. Br. at 6-8, 25-26, Bid Specification 13.1, J.A. 71 *et seq.*, the Harmony Clause has nothing to do with strikes at the end of labor agreements or disputes between labor and management. It deals only with disputes between groups of employees. However, even before the Agreement was negotiated, the pre-existing trade collective bargaining agreements for the various trades (which are incorporated by reference into the Agreement as Schedules A and B) already prohibited strikes and work stoppages during the terms of those agreements. This is consistent with NLRA §8(b)(4) and (7), which generally prohibits unions from striking to protest the presence of non-union workers. Thus, the "labor strife" that MWRA says it fears seems to be illegal and potentially extortionate.

different from those used by the federal government and most states. Massachusetts insists on dealing directly with each subcontractor, rather than simply hiring a general contractor and letting him hire whatever sub-contractors he wishes. Massachusetts regulates the details of sub-contractors' bids and contracts directly with the primary sub-contractors in each of seventeen statutorily defined trades. Filed Sub-Bid Law, M.G.L. c. 149, §§44A *et seq.* As MWRA itself noted in its Petition, p. 18 n.8, "Massachusetts' competitive bidding laws, to which the Authority's Enabling Act explicitly subjects it, make clear that the competitive bidding process must be carried out by the awarding authority."

The Filed Sub-Bid Law requires would-be sub-contractors on a project to file their bids with the state agency before a general contractor is selected. Each awarding agency must publish specifications for sub-bids in each of seventeen named classes of work and certain sub-trades. M.G.L. c. 149, §44F. Each bidder must submit a detailed sub-bid.

MWRA has executed contracts with each of several general contractors for different aspects of the project and has signed contracts with sub-contractors in most of the seventeen statutory sub-contract classifications. Kaiser has not signed contracts with any of the general contractors or sub-contractors. Kaiser is not the general contractor of the Harbor Project. It is an agent of MWRA and a management consultant. Pet. Br. 4.

The sub-bidder is not required by c. 149 or any other law to execute a collective bargaining agreement. As discussed above, the statute contemplates that union and non-union workers of different sub-bidders can and will work in harmony. Before the Harbor and Central Artery Projects, no Massachusetts agency had ever required a sub-contractor to execute a collective bargaining agreement as a condition of a contract award. In *Rudolph v. City Manager of Cambridge*, 341 Mass. 31, 167 N.E.2d 151 (1960), the Supreme Judicial Court refused to permit an awarding agency to reject an otherwise competent lowest filed sub-bidder on the basis of a local preference. "The statute read as a whole shows an unmistakable intent that the power of the awarding authority to require the

rejection of a subbid, which is in all formal aspects satisfactory, in favor of a higher available bid, may be exercised only for lack of competence of the rejected bidder." *Id.* at 35. Similarly, MWRA cannot reject the lowest qualified bidders because they decline to sign the union-only Agreement.

In short, a review of the regulatory scheme for public contracts and bidding that MWRA must obey shows that MWRA's attempt to set conditions of collective bargaining exceed its authority. No statute expressly authorizes MWRA to require union-only labor on the Project or to authorize Kaiser to negotiate the Project Labor Agreement. MWRA's efforts to force the unionization of the Harbor Project work force extend far beyond the limited objectives of the Commonwealth's public contract laws. Those procurement laws require awarding contracts to the lowest eligible and responsible bidder, unionized or not. Consequently, MWRA cannot defend its conduct "as a legitimate response to state procurement constraints or to local economic needs." *Gould*, 475 U.S. 282, 291 (1986). Rather, MWRA's scheme is unconnected to the state concerns defined by the Legislature's procurement laws.

III. Even if MWRA is Acting Within its Statutory Discretion, It Cannot Disguise Its Attempt to Dictate the Terms of Collective Bargaining as Merely "Proprietary."

This Court need not decide any disputed issue of state law to resolve this case. Even if MWRA were to argue that its state law authority could be strained to cover its labor law scheme its argument would undermine its central thesis that it is acting in a purely "proprietary" role exempt from federal regulation.

MWRA may contend that, while its Bid Specification is not expressly authorized by statute, it is nonetheless acting within its administrative discretion under its enabling act. Act 372, §§1, 3(a), 5(a)(ii), 6. MWRA's basic argument does have a superficial simplicity: it claims that private proprietors can insist on agreements like the Agreement here; MWRA, although a state agency, is the proprietor of the Harbor Project, with broad statutory discretion to

spend the ratepayers' money to develop state property; so why should MWRA not have the same proprietary economic rights that private proprietors have? MWRA seeks to import into labor law the "proprietary" versus "regulatory" distinction of Commerce Clause cases such as *White v. Mass. Council of Construction Employers, Inc.*, 460 U.S. 204 (1983).

However, this is not a state's rights case. UCANE agrees with ABC's analysis of why the "regulatory" versus "proprietary" distinction has no place in federal labor law. A brief look at the state law source of MWRA's powers and function confirms this analysis. First, under Massachusetts law, MWRA is not a mere proprietor empowered to do whatever it sees fit but barred from regulating. Rather, MWRA's enabling act makes it an agency of limited powers and functions but inextricably interweaves its authority to regulate the water and sewer system with its authority to renovate that system. The more sweeping the interpretation of MWRA's authority, the more clearly impossible it is to distinguish a "regulatory" from a "proprietary" role. Second, a survey of MWRA's position under state law illustrates the unworkability of Petitioners' proposed distinction between preempted regulatory conduct and permissible proprietary conduct. A state agency, like MWRA, impermissibly invades the protected sphere of collective bargaining when its activities have a direct and substantial effect on that sphere, however it labels its interference. Finally, Massachusetts law prevents MWRA from using Kaiser as a mask to disguise its scheme as one within the NLRA's limited exception for pre-hire agreements in the construction industry. Under Massachusetts law, the Agreement is between MWRA and BCTC, not between Kaiser and BCTC; MWRA is not a "construction industry employer." Therefore, the scheme falls outside the limited exceptions in NLRA §8(e) and (f) for construction employers who make pre-hire agreements that otherwise would be unfair labor practice under §8(a) and (b).

A. *A State Infringes Federally Guaranteed Liberties When it Dictates a Collective Bargaining Agreement to Private Parties, Even if it Enforces its Commands by Threatening to Withhold State Funds.*

1. *Because the State Simultaneously Acts as "Regulator" and "Proprietor" the Distinction Between the Two Roles Has No Place in Federal Labor Law.*

MWRA's simplistic argument ignores the fundamental principle of American government: our democratic government is one of limited powers. When the public interest requires delegating to a governmental agency great power to accomplish great public ends, it becomes all the more important to require the agency to respect individual rights. As this Court said in *Gould*, 475 U.S. at 290, "government occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints." The First Circuit pointed out below that "the entire Bill of Rights," 935 F.2d at 358 n.26, is an example of those special restraints imposed on state action, whether that action is characterized as "regulatory" or "proprietary." The right to be "free of governmental regulation of the 'peaceful methods of putting economic pressure upon one another' *Machinists*, 427 U.S. at 154, is a right specifically conferred on employers and employees by the NLRA." *Golden State Transit Corp. v. City of Los Angeles (Golden State II)* 493 U.S. at 112. It is a "guarantee of freedom for private conduct that the State may not abridge." *Id.* Accordingly, the NLRA "treats state action differently from private action not merely because they frequently take different forms, but also because in our system States simply are different from private parties and have a different role to play." *Gould*, 475 U.S. at 290.

MWRA's own role, mixing regulatory and proprietary activities as no private owner could and pursuing its regulatory mission by regulatory means, illustrates this point. Unlike every private proprietor, MWRA need not be concerned about the costs of its Project. It is a state monopoly that can raise water and sewer rates as high as it needs to in order to raise the money it spends. It does not need the approval of any other agency to set the rates as it sees

fit. Act 372, §§6(k), 10. MWRA's statutory mission, defined by its enabling act, is the quintessential regulatory task of promoting the general health and welfare, protecting the environment, *id.*, §1, and ensuring compliance with state and federal environmental laws, §8(i). MWRA alleges that the scheme challenged here was adopted to accomplish its statutory mission. The Massachusetts Legislature has ordered MWRA both to "operate" and to "regulate" concerning water and sewage systems. Act 372, §1. The act empowers the agency to "develop its rules and regulations," §5(a)(ii); "to adopt and enforce procedures and regulations," §6(e); "to enter into contracts, arrangements and agreements with other persons in all matters necessary or convenient to the operation of this act," §6(o); and "to do all things necessary, convenient or desirable for carrying out the purposes of this act or the powers expressly granted or necessarily implied by this act," §6(r). Moreover, "the exercise by the Authority of the powers conferred" by the act are "deemed to be the performance of an essential public function." §3(a).

Under Massachusetts law the challenged Bid Specification is a regulation. State law defines a "regulation" as a "requirement of general application and future effect, adopted by an agency to implement . . . the law enforced or administered by it." M.G.L. c. 30A §1(5). There is no question that the Bid Specification is a requirement of general application and future effect: MWRA's Board formally voted its approval of the Project Labor Agreement as an official policy and directed that the Bid Specification shall apply to every one of thousands of bidders on hundreds of contacts over the life of the Harbor Project. Pet. Br. 7-8. MWRA claims that the Bid Specification is a necessary or convenient method of implementing its enabling act which directs it to complete the Harbor Project. Pet. Br. 8 n.3, 25-26. Petitioners concede that the Agreement would not itself be binding on any general contractor or subcontractor but for the Bid Specification forcing each such contractor to execute the Agreement. *Id.* at 7-8; U.S. Br. 4, 10. Under the general bidding regulations any successful bidder who fails to comply with Bid Specification 13.1 by unionizing his workers would be severely penalized. He would automatically lose

a deposit equal to five percent of the contract price. M.G.L. c. 30, §39M, c. 149, §44B(3),(4). MWRA has adopted regulations authorizing it to impose additional civil penalties on anyone for failing to comply with any of its regulations, orders, requirements, or approvals. 360 C.M.R. §2.03, §2.05; MWRA apparently could invoke this penalty provision against bidders who defy its union-only requirement.

Whether one calls MWRA's union-only requirement a "bid specification" or a "regulation" makes no practical difference at all. "The effect of such 'conditions' on the ability . . . to deal with affected firms would be virtually identical to the effect of a conventional market regulation requiring such practices." *White v. Mass. Council of Construction Employees*, 460 U.S. 204, 220 (Blackmun, J. dissenting). Mr. Justice Blackmun has explained clearly why this sort of requirement is, in practical effect, regulatory:

> The power to dictate to another those with whom *he* may deal is viewed with suspicion and closely limited in the context of purely private economic relations. When exercised by government, such a power is the essence of regulation.
>
> Attempts directly to constrict private economic choices through contractual conditions are particularly akin to regulation because, unlike simple refusals to deal but like conventional market regulation, they threaten to extend their regulatory impact well beyond the transaction in which the State has an interest.
>
> . . .
>
> But when a State attempts to arrogate unto itself the "independent discretion" of others to deal with whom they please it exercises regulatory power . . . .

Id., at 219-20, 221 (emphasis in original). While in the Commerce Clause context, this practical effect was not held to be enough to strike down the state action, "[w]hat the Commerce Clause would permit States to do in the absence of the NLRA is . . . an entirely different question from what States may do with the Act in place." *Gould*, 475 U.S. at 290. As discussed in Part I above, and

contrary to Petitioners' claim, Pet. Br. 26, MWRA's restriction on private economic choice in collective bargaining does indeed extend its regulatory impact well beyond MWRA's own Harbor Project contracts. This governmental interference with private individual choice is precisely what the preemption doctrine under *Machinists* 427 U.S. 132, is intended to avoid.

2. *Under the NLRA, State Action is Preempted if its Effect is to Dictate Collective Bargaining Terms to Private Employers and Employees.*

If federal labor law is to protect the individual rights that Congress intended, the only practical test of preemption is the objective effect of the state's action, not the label the state chooses or the means the state uses. "Judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." *Golden State Transit Corp v. Los Angeles*, 475 U.S. 608, 614 n. 5 *quoting San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959). In other federal preemption contexts this Court has decisively rejected

> the aberrational doctrine . . . that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. . . . [S]uch a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy -- other than frustration of the federal objective -- that would be tangentially furthered by the proposed state law.

Perez v. Campbell, 402 U.S. 637, 651-52 (1971). So too, in labor law if a state infringes a protected federal right, good intentions do not immunize the state's actions.

When a state's activities substantially and directly limit private collective bargaining then it regulates collective bargaining and its activities are preempted by the NLRA, even if the state asserts another purpose or effect. *See Gade v. National Solid Waste Management Assn.*, 60 U.S.L.W. 4587 (1992) (state law

requirement that directly, substantially, and specifically regulates occupational safety and health is an "occupational safety and health standard" within meaning of Occupational Safety and Health Act preemption clause, even if it has another non-occupational purpose and/or effect).

MWRA's use of the state's spending power to control private collective bargaining does not save its scheme. In areas of the law "outside the area of Commerce Clause jurisprudence, it is far from unusual for federal law to prohibit States from making spending decisions that are permissible for private parties." *Gould*,475 U.S. at 290. A private employer can fire an at-will employee for expressing political opinions he dislikes, but the First Amendment prohibits a state from doing so. *Elrod v. Burns*, 427 U.S. 347 (1976).

Because MWRA's Bid Specification compels all successful contractors to sign the specific collective bargaining Agreement negotiated by Kaiser on behalf of MWRA, the Specification is preempted.

B. *Under Massachusetts Law, the Agreement is Not Between Kaiser and BCTC and So Does Not Fit into the Exemptions in §8(e) and (f) of the NLRA.*

The Petitioners and the United States rest their case on their claim that MWRA is doing no more than any private proprietor could do. Pet. Br. at p. (i) (Question Presented); U.S. Br. at p. (i). Their argument can support the weight of their case only if MWRA really is doing no more than a similarly situated private proprietor could do under the NLRA. But a private proprietor could not carry out MWRA's scheme.

A private proprietor can obtain the §8(e) and (f) exemptions from the NLRA's prohibitions on unfair labor practices only if the agreement in question is "between a labor organization and an employer in the construction industry," §8(e). *Accord*, §8(f) (exemption for agreement between "employer primarily engaged in the building and construction industry" and union having members who are construction employees). The Petitioners claim that the Agreement is within these exemptions because it is between Kaiser and the BCTC; and Kaiser is a "construction industry employer."

Pet. Br. 28. In turn, Bid Specification 13.1 allegedly is legal because it carries out the terms of the Agreement by requiring all contractors to execute the Agreement. *Id.* and at 7, 8 n.3.

It is undisputed that Kaiser negotiated and entered into the Agreement as the authorized agent of MWRA. *Id.* at 7; U.S. Br. 3-4. The Agreement itself states in bold capital letters on the cover that Kaiser is acting "ON BEHALF OF THE MASSACHUSETTS WATER AUTHORITY." MWRA ratified its agent's action after reviewing the Agreement. *See* Pet. Br. 7; U.S. Br. 4. For the purposes of this litigation, the crucial provision of the Agreement is §2. It limits MWRA's "absolute right to select any qualified bidder" by obliging MWRA to select only bidders "willing ready and able to execute and comply with the Project Labor Agreement." §2(a). All contractors "shall be required to accept and be bound by the terms and conditions of this Project Labor Agreement." §2(b). Petitioners concede that only MWRA, not Kaiser, could give these provisions any effect by imposing Bid Specification 13.1. Pet. Br. 8; U.S. Br. 4. Surely Kaiser would not have made a promise it knew it could not keep and BCTC would not have made concessions in return for a promise it knew was worthless. The Agreement expressly binds Kaiser itself only insofar as Kaiser may someday employ craft workers to do construction work on the Project. Agreement, Introduction ¶ 3. In short, this is a classic instance of a contract entered into by an agent on behalf of a disclosed principal.

"The law is settled in Massachusetts that '[u]nless otherwise agreed, a person making or purporting to make a contract for a disclosed principal does not become a party to the contract.' *Porshin v. Snider*, 349 Mass. 653, 655 (1965)." *Paterson-Leitch Co., Inc. v. Massachusetts Municipal Wholesale Electric Co.*, 840 F.2d 985, 993 (1st Cir. 1988) (construction manager that negotiated and signed project labor agreement was agent for owner and as such was not bound by the contract). This has been the law of Massachusetts for over a century. *IRS v. Blais*, 612 F.Supp. 700, 706 (D. Mass. 1985); *Cass v. Lord*, 236 Mass. 430, 432, 128 N.E.2d 716 (1920), *Goodenough v. Thayer*, 132 Mass. 152 (1882).

Therefore, Kaiser is not in privity of contract with the BCTC as to the provisions of the Agreement requiring unionization. Therefore, the Agreement is not an agreement between a "construction industry employer" and unions; it does not come within the §8(e) and (f) exceptions and does not provide any cover for MWRA's bid specification.[7] It would not come within those exceptions even if MWRA were a private party.[8]

MWRA itself is not a "construction industry employer" but a public water and sewer agency. Petitioners explicitly say that they do not claim that MWRA is a "construction industry employer," as

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[7]Even if one were to assume *arguendo* that Kaiser *is* the "employer," then MWRA's delegating the power to negotiate to Kaiser and then imposing Bid Specification 13.1 to enforce Kaiser's union-only Agreement would violate the Massachusetts constitutional rights of contractors and their employees. Articles I, X and XII of the Declaration of Rights of the Massachusetts Constitution protect all persons in the enjoyment of their life, liberty and property, including the right to engage in a lawful occupation. *McMurdo v. Getter*, 298 Mass. 363, 365-66, 10 N.E.2d 138 (1937). Delegating to private parties, such as Kaiser, the right to regulate the terms and condition of employment of other persons deprives the involuntarily regulated persons of their constitutional right to engage in a lawful occupation. *Opinion of the Justices to the Senate*, 337 Mass. 796, 799, 151 N.E.2d 631 (1958). Even if NLRA §8(f) permits a private proprietary or private construction industry employer to exercise such power, the Massachusetts Constitution prohibits the MWRA from assisting Kaiser in doing so by imposing the Agreement by means of Bid Specification 13.1.

[8]Because MWRA's action does not fall within the §8(e) and (f) exemptions, it follows by the logic of the argument presented by the United States, that MWRA's conduct interferes with the federally protected rights of employees under NLRA §7 to select their own representatives and so is preempted under the *Garmon* preemption doctrine. U.S. Br. n. 15, *citing San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and *Brown v. Hotel Employees Union Local 54*, 468 U.S. 491, 501 (1984).

defined in §8(e) and (f). Pet. Br. 28. A private proprietor acting as MWRA has done also would not be a "construction industry employer." The NLRB and the federal courts have recognized two tests to decide whether a firm is a "construction industry employer": (1) whether it obtains most of its revenue from performing construction work, *Carpet Linoleum & Soft Tile Local Union No. 1247, Painters (Indio Paint and Rug Center)*, 156 NLRB 951, 61 L.R.R.M. 1191 (1966); *see NLRB v. W.L.Rives Co.*, 328 F.2d 464, 469 (5th Cir., 1964); or (2) whether, it is an owner acting as its own general contractor, *A.L. Adams Construction Co. v. Georgia Power Co.*, 733 F.2d 853, 858 (11th Cir. 1984), *cert. denied* 471 U.S. 1074 (1985) MWRA does not obtain significant revenue from doing construction work; rather, it obtains its revenue from water and sewer ratepayers. Act 372, §10. Nor is MWRA the general contractor on the Harbor Project; rather it has contracted with several general contractors for the various phases of the project.[9] Pet. Br. at 4. Thus, a private party that did what MWRA has done would not qualify for the exemptions in NLRA §8(e) and (f). Petitioners' central analogy fails and with it their entire argument.[10]

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[9]Kaiser is not one of these general contractors. Rather, it is the project manager. Pet. Br. 4. Kaiser has not entered into contracts with any of the general contractors or sub-contractors. Under Massachusetts law, MWRA itself is required to execute the contracts. M.G.L. c. 30 §39M, c. 149 §44A *et seq.*

[10]MWRA can no more hide behind the general contractors than it can hide behind Kaiser. It is undisputed that the general contractors and subcontractors had nothing to do with negotiating the agreement but rather are required by MWRA's Bid Specification to execute the Agreement. Pet. Br. 7-8. Moreover, as shown above at pp. 10-14, unlike a private proprietor, MWRA is prohibited by state law from refusing to accept bids from qualified bidders solely because they are not unionized. Petitioners have impliedly conceded this when they stress that the bidding process is open to all firms and workers (who are willing to unionize). Pet. Br. 8,

(continued...)

The correct analogy is not between MWRA and a hypothetical private proprietor but between MWRA and NLRB. Like NLRB, MWRA is a government agency that is prohibited from interfering with economic competition among private parties. *Machinists* 427 U.S. at 144-151. The NLRB's authority in labor law is much greater than a state's, but even the NLRB cannot impose the terms of a collective bargaining agreement on private parties or force them to agree. *See* NLRA §8(b). That is exactly what MWRA is trying to do here and it is exactly what federal law preempts.

CONCLUSION

At bottom, this case is about a state agency that has surrendered to union threats of strikes and picketing and has made a political accommodation to reject all qualified lowest bidders who decline to unionize on the unions' terms. The losers are all those firms that could save the public money by underbidding the firms that have accepted the unions' terms and all those employees who choose to exercise their federal rights not to join unions. The people of Massachusetts also lose. By denying qualified contractors and employees work on the Harbor Project that they are

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[10](...continued)

26. Furthermore, MWRA has not insulated itself by hiring a general contractor who in turn would hire subcontractors and then, acting as a "construction industry employer" would force them to unionize pursuant to NLRA §8(e) and (f). As explained above, state law requires MWRA itself to contract directly with all of the general contractors and primary subcontractors. M.G.L. c. 149 §§44A *et seq.*

Bizarrely, MWRA claims far more power to interfere with the freedom of choice of the employees of third parties than it has regarding its own employees. *See* M.G.L. c. 150A, §§ 2, 4, 12, prohibiting all state agencies, including MWRA, from compelling unionization of their employees, and from compelling payment of any sum by any employee to a union except defined service fees to unions previously elected by a majority of employees. Moreover, even these collective bargaining agreements cannot run more than three years. *Id.* §7.

entitled to, the MWRA's union-only scheme violates state law. It denies contractors such as many of UCANE's members their federally guaranteed right to bargain collectively for themselves rather than have the terms of employment dictated by the state. Most basically, MWRA's discriminatory scheme is grossly unfair and is preempted by the National Labor Relations Act. For the reasons stated above and in the Respondents' Brief, the judgment of the First Circuit en banc should be affirmed.

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Respectfully submitted,
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